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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-54

ITT GILFILLAN, a corporation,

Petitioner,

vs.

CLIFFORD E. CLAYTON,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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The petitioner ITT GILFILLAN respectfully prays that a Writ of Certiorari issue to review the Judgment and Revised Opinion of the United States Court of Appeals for the Ninth Circuit entered in the entitled case on April 14, 1980.

QUESTIONS PRESENTED

1. Does the Employee's failure to exhaust internal union remedies, which were found to be adequate by the District Court, bar his action against the Company as well as the Union.

2. Does the fact that the internal union remedies only provide monetary damages and do not provide for reinstatement make those remedies "inadequate" as a defense for the Company.

3. May internal union remedies be deemed adequate to bar an action against the Union because of the Employee's failure to exhaust those remedies, but be deemed inadequate to

bar an action against the Company because they can not provide reinstatement of the grievance.

4. Is the Union a necessary and indispensable party for the Employee to prove that the Union breached its duty of fair representation.

5. May an employee who chooses not to exhaust internal union procedures, proceed solely against the Company and require the Company to present the Union's defense to the alleged breach of the duty of fair representation.

PARTIES APPEARING
BEFORE THE NINTH CIRCUIT
COURT OF APPEALS

Respondent Clifford Clayton was the plaintiff before the District Court in the Central District of California.

Petitioner ITT Gilfillan was one of the defendants in the District Court. There were two other defendants: the United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 509 and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

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OPINIONS BELOW

The initial opinion filed by the Ninth Circuit Court of Appeals on September 4, 1979 was not officially reported. That opinion appears in the Appendix hereto, and is unofficially reported at 102 LRRM 2190. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing in Banc was denied on April 14, 1980. A Revised Opinion of the Court of Appeals was entered on April 14, 1980 (hereinafter, "Rev. Op."). It is not officially reported as of the date of this Petition and appears in the Appendix hereto.

The initial Judgment in this case was entered on May 31, 1977 by Judge

Irving Hill of the United States District Court for the Central District of California. The Findings Of Fact and Conclusions Of Law, were filed on May 27, 1977. Both documents appear in the Appendix hereto. No order or opinion issued by Judge Hill in this case has ever been reported officially.

JURISDICTION

This Petition For Writ Of Certiorari is filed within ninety days from April 14, 1980 the date of the entry of judgment upon the Revised Opinion of the Ninth Circuit Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 29, §185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. United States Code, Title 29, §411(a)(4)

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time)

within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

3. United States Code, Title 28, Federal Rules of Civil Procedure, Rule 19

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a

party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant,

or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment

rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

STATEMENT OF THE CASE

This case arises from the discharge of Clifford E. Clayton ("Employee") by his employer, ITT Gilfillan ("Company"). The Employee was represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 509 (jointly referred to herein as "Union") which had a collective bargaining agreement ("Contract") with the Company. That Contract contained a mandatory grievance and arbitration procedure and within the time limits allowed by the Contract, the Union filed a grievance on the Employee's behalf contesting the discharge. After an investigation and the pursuit of the

grievance through the third step of the grievance procedure, the Union withdrew the grievance. Under the Contract such a decision, is final and binding on the Union.

The Employee did not attempt to exhaust the internal union remedies available to challenge the Union's refusal to pursue his grievance. Instead, the Employee filed a lawsuit alleging that the Union breached its duty of fair representation and the Company violated the contract when the Employee was discharged.

After the first phase of a trifurcated trial, the District Court found that: (1) The Employee had failed to exhaust his intraunion remedies; (2) those intraunion

remedies provided a sufficient means to redress his grievance; and, (3) the Employee's failure to exhaust his intraunion remedies could not be excused as futile. The Court held as a matter of law that the Employee could not maintain his suit against the Union or the Company.

On appeal the Ninth Circuit Court of Appeals affirmed the dismissal of the Union. However, it reversed the dismissal of the Company on the ground that "if a claimant, by exhausting internal union remedies, could not obtain the same relief sought in a civil action against an employer, the employer may not raise the failure to exhaust internal union remedies as a defense." (Rev. Op. p.11-12)

REASONS FOR GRANTING THE WRIT

I

INTRODUCTION

This case raises a basic issue which must be resolved by this Court in order to give guidance to federal courts in the application of the numerous conflicting duty of fair representation cases which arise from the decision in Vaca v. Sipes, 386 U.S. 171 (1967). As is set forth below in more detail, there are various interpretations of a company's right to rely upon the failure of a union member to exhaust internal union remedies. Not only are there conflicting opinions between circuits,

but also conflicting Court of Appeals opinions within the same circuit.

There are three principal positions approved by various federal courts:

1. The employee's failure to exhaust internal union procedures may never be raised as a defense by the employer.

2. The employee's failure to exhaust internal union remedies is a defense for both the union and the employer, provided the remedies available are adequate, and the pursuit of those remedies is not futile.

3. The employee's failure to exhaust internal union remedies is a defense for the

employer only if the exhaustion of those remedies could result in the reinstatement of the grievance.

The practical effect of the last position is the same as the first in most cases since few if any collective bargaining agreements allow the reinstatement of the grievance if an internal union appellate procedure finds the union breached its duty of fair representation.

In addition to these three principal positions, the Court of Appeals in the Clayton case combined positions two and three. The Court of Appeals concluded that the internal union remedy was adequate and freely available to the Employee. As a result

the Union was dismissed as a defendant because the Employee failed to exhaust those remedies. However, the Company was not dismissed because those internal union remedies could not result in the reinstatement of the Employee's grievance. Thus the case was remanded to the district court with instructions to hold a trial upon the duty of fair representation issue (without the Union) and if the district court were to conclude a breach occurred, to proceed to a trial of the breach of contract issue.

It is the Company's position that if the exhaustion of internal union remedies is to be allowed as a defense, it must benefit both the Union and the Company, provided those

remedies are not inadequate or futile. As the record below supports, and as found in many federal court decisions, the Union's internal remedies are among the best of any union in the United States. In Winter v. Local 639, 569 F.2d 146 (D.C. Cir. 1977) the Court stated:

> "The UAW, significantly, has what is probably the most elaborate and comprehensive system of internal appeals of any American union, culminating in an appeal to a non-partisan panel composed of eminent persons with no connection to the Auto Workers. The UAW procedures, virtually unique among unions, may well enable a worker to get redress 'without prejudice to his rights'."

569 F.2d at 151 n.26.

To adopt the position that the failure to exhaust internal union remedies may bar an employee's claim against his union, but not his claim

against his employer, places an inequitable burden on the employer, and may result in the employee prevailing on the duty of fair representation (hereinafter sometimes "DFR") issue by default since the union is not a party.

If this defense is not equally available to both the Company and the Union, it should be available to neither. To conclude otherwise results in the Company defending the DFR issue because the Union is no longer a party. The imposition of such a responsibility upon the Company is neither fair nor justifiable. It is the Union which is in possession of the facts necessary to defend against the DFR issue. The facts as to the reasons

for the Union's decision not to pursue the grievance are not within the knowledge of Company witnesses. Once the Union is dismissed from the lawsuit its officers and members do not have any incentive to cooperate with the Company. The Union has no further exposure to liability. In fact there is the possibility of collusion since a finding that the Union breached its DFR would assist the member in pursuing his case against the Company and there would be no liability for the Union.

In addition it is the Company's position that the attempt to try the DFR issue without the Union would constitute the failure to join an indispensable party, and would result

in material prejudice to the Company (See Argument infra, at p. 47).

As the arguments below set forth, this Court should grant certiorari and reverse the opinion below. That decision must treat the Company and the Union in a like manner.

II.

A SERIOUS CONFLICT EXISTS AMONG FEDERAL COURT DECISIONS

A. The Nonexhaustion Of Intraunion Remedies Defense Is Available To The Employer Only If Those Remedies Permit Reinstatement Of the Grievance

The Clayton Revised Opinion concluded that the internal union

remedies were "insufficient" since they could not lead to the reinstatement of Clayton's grievance. (Rev.Op.p.22). However this internal union procedure which the court found to be "insufficient" as a defense for the Company, was found to be a "fair and adequate" procedure as a defense for the Union. (Rev.Op.p.8).

Similar holdings appear to have been adopted in the Seventh and Tenth Circuits.

In Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977), the Seventh Circuit ruled that the employee's exhaustion of intraunion remedies was a legitimate concern of the employer only when such remedies could result in a reinstatement of the

grievance. "To raise this defense ... the employer must establish that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance with the provisions of the collective bargaining agreement." 558 F.2d at 1279. The Seventh Circuit reaffirmed its Harrison ruling in Baldini v. Local Union No. 1095, 581 F.2d 145 (7th Cir. 1978), where it found that the nonexhaustion of intraunion remedies defense is inapplicable to the employer where "the union no longer had the power to revive the grievance procedure." 581 F.2d at 150.

In Vara v. Dillon Companies, Inc., 615 F.2d 1315 (10th Cir. 1980), the Tenth Circuit allowed the employer to assert the exhaustion defense only because it found that the intraunion remedies in that case could have led to reinstatement of the grievance. However, as in other circuits, there appears to be a split of authority. (See the discussion of the Tenth Circuit decision in Fizer v. Safeway Stores, Inc., 586 F.2d 182 (10th Cir. 1978), infra, p. 35.)

B. The Employer Can Rely Upon The Nonexhaustion Defense Unless The Plaintiff Has A Proper Excuse For Non-exhaustion

Federal courts in the First, Third, Sixth, and Eighth Circuits have issued decisions permitting an employer to rely upon the nonexhaustion defense unless the plaintiff can prove that the intraunion procedures were inadequate or it would have been futile to pursue them.

One of the recent cases rejecting the rule adopted by the Ninth Circuit is the case of Rainey v. Missouri Utilities Co., 596 F.2d 310 (8th Cir. 1979). In that case the court con-

cluded that the International Brotherhood of Electrical Workers provided an adequate internal union remedy and that the plaintiff had no excuse for his failure to exhaust that remedy. As a result the Eighth Circuit affirmed the district court's decision dismissing the union and the employer.

Subsequent to the Rainey decision, a district court in the Eighth Circuit (Neiger v. Sheet Metal Workers Int'l., 470 F.Supp.622 (W.D. Mo. 1979), stated as follows:

> "The Eighth Circuit rule on failure to exhaust internal union remedies is clear. . . . That rule was recently reaffirmed by the Eighth Circuit in Rainey v. Missouri Utilities Co. etc., 596 F.2d 310 (1979), where the Court of Appeals held that summary judgment in favor of both the union and the employer is required when a plaintiff in a suit of this kind has failed to exhaust

> all of the union's available internal remedies, and has failed to show any reason for his failure to do so." 470 F. Supp. at 629 (Emphasis added).

A similar rule has been adopted by most federal courts in the Third Circuit. In Aldridge v. Ludwig-Honold Mfg. Co., 385 F.Supp. 695 (E.D. Pa. 1974) aff'd mem., 517 F.2d 1397 (3rd. Cir.), cert. denied, 423 U.S. 937 (1975), the plaintiff's failure to exhaust internal union remedies barred his claim against the union and the employer. A subsequent case which cited Aldridge, supra, and reached the same conclusion, is Kobielnik v. International Brotherhood of Teamsters, etc., 470 F.Supp. 125 (E.D. Pa. 1979). In explaining that decision the court stated:

"Furthermore, had plaintiff exhausted his internal union remedies, it might have been shown that the Union did not breach its duty to plaintiff. Under these circumstances the direct action, permitted by Vaca v. Sipes, supra, against the employer (Eastern) would not lie. Neipert v. Arthur G. McKee & Co., 448 F.Supp. 206 (E.D.Pa. 1978). Because plaintiff has challenged neither the availability nor the adequacy of the internal union remedies provided by the Union constitution and has not explained satisfactorily his failure to utilize them, the motion of defendants Eastern, the Union and Local 107 will be granted." 470 F.Supp. at 128.

In Pawlak v. International Brotherhood of Teamsters, etc., 444 F. Supp. 807 (M.D. Pa. 1977), aff'd. mem. 571 F.2d 572 (3rd Cir. 1978), the court dismissed the action against the employer on the same ground of failure to exhaust internal union procedures as it used to dismiss the action against the union.

In Neipert v. Arthur G. McKee & Co., 448 F.Supp. 206 (E.D. Pa. 1978), the court noted that the "Eastern Michigan rationale applies: had plaintiff exhausted his [union] remedies, it might have been shown that the [union] Council did not breach its duty to plaintiff, in which case the direct action against the employer, permitted by Vaca v. Sipes [citation] when the union is shown to have breached its duty of fair representation, would not lie." 448 F.Supp. at 210.

In Gerb v. Boeing Company, 102 LRRM 2854 (E.D. Pa. 1979), which relied upon Pawlak, supra, among other cases, the court found that cases in the Third Circuit have held that

failure to exhaust internal union remedies not only bars the claim against the union but also the claim against the employer. Other Third Circuit cases in agreement with this characterization of the nonexhaustion defense are: Dezura v. Firestone Tire & Rubber Company, 470 F. Supp. 121 (E.D. Pa. 1979), aff'd. mem. 612 F.2d 571 (3rd Cir. 1979); and Rehm v. Quaker Oats Co., 478 F. Supp. 619 (M.D. Pa. 1979).

The Sixth Circuit has issued conflicting decisions on the effect of the plaintiff's failure to exhaust internal union remedies. In Willetts v. Ford Motor Co., 583 F.2d 852 (6th Cir. 1978), that Court of Appeals was faced with a situation very similar to

that faced by the Ninth Circuit in the Clayton case. The plaintiff in that case was discharged and the union withdrew the grievance filed on his behalf after the second step of the grievance procedure. Without attempting to exhaust internal union remedies the plaintiff sued his union and the employer. The Sixth Circuit in affirming the district court's decision to dismiss plaintiff's claim against both the union and the employer because of the plaintiff's failure to exhaust internal union remedies, stated:

> "'The reason for this requirement is that intra-union remedies are part and parcel of the industrial in-house procedure for settling labor disputes. The primary benefit of requiring initial submission of employee complaints against a union that refuses to help process a grievance against a company is that

> internal machinery can settle difficulties short of court action. Thus, federal policy requires "staying the hand of 'judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own internal affairs.'"'" 583 F.2d at 855-856 [citation omitted].

Finding that the plaintiff was responsible for the inability to invoke this process, the court dismissed all claims against the union and the employer.

In contrast, the Sixth Circuit in a subsequent case, Geddes v. Chrysler Corp., 608 F.2d 261 (6th Cir. 1979), without overruling Willetts, supra, concluded that the failure to exhaust defense was a contractual defense only available to the union and that the employer has no right to raise that defense.

The Willetts case was expressly followed by the district court in Sherba v. Teamsters, Local 400, 101 LRRM 2582 (N.D. Ohio 1979), when it dismissed the plaintiff's claims against both the union and the employer for plaintiff's failure to exhaust intraunion remedies.

A district court in the First Circuit, Provencal v. Allegheny Airlines, Inc., 383 F. Supp. 159 (D. Rhode Island 1974), stated that a union member "must exhaust his intra-union remedies in the absence of a showing that it would be futile to do so or that said remedies are inadequate." 383 F. Supp. 161-162. Because the plaintiff had not satisfied this rule, the court

dismissed the plaintiff's claim against the union and his employer.

C. The Employer Is Unable To Raise The Nonexhaustion Defense

Several federal courts have ruled contrary to all the decisions discussed above and have precluded an employer from ever raising this non-exhaustion defense.

Though the Fifth Circuit Court of Appeals has never issued a decision on this question, a district court within that Circuit in Wade v. Southern Pacific Co., 243 F.Supp. 307 (S.D. Tex. 1965), supra, declared the non-exhaustion defense was available to the employer subject to the defenses of futility and inadequacy. Two more recent district courts in that

Circuit, however, have ruled that the nonexhaustion defense is unavailable to the employer. In Anderson v. Grocers Supply Co., Inc., 483 F.Supp. 73 (S.D.Texas 1979), and Pierce v. Fox Manufacturing Co., 97 LRRM 2321 (N. D. Ga. 1977), the district courts concluded that the nonexhaustion defense is a contractual defense which is only available to the union. As noted previously the Sixth Circuit in Geddes v. Chrysler Corp., supra, took a position diametrically opposed to its earlier decision in Willetts v. Ford Motor Co., supra. In Geddes the court relied on the contract theory and denied the employer any benefit from the nonexhaustion defense.

The Eighth Circuit Court of Appeals in Rainey, supra, found that summary judgment can be granted an employer because of the plaintiff's failure to exhaust his intraunion remedies. The court in Rainey, however, neglected to distinguish, or overrule its earlier decision in Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972). In Petersen the Court declared: "The question of exhaustion of internal Union procedures is the Union's concern, not the Company's." 461 F.2d at 315.

A district court, relying on Petersen, has stated flatly that the nonexhaustion of intraunion remedies defense is not available to a defendant employer. Miller v. Local 50, 468 F. Supp. 193, 198 (D. Neb. 1979).

In Vara, supra, the Tenth Circuit Court of Appeals recognized the non-exhaustion defense as one available to an employer. However, the Court of Appeals failed in its opinion to recognize the conflict with Fizer v. Safeway Stores, Inc., supra. The Fizer opinion states that the non-exhaustion defense cannot be raised by an employer who is not a party to the contract between the union and its members. The Vara court clearly was aware of the Fizer opinion because it distinguished Fizer on another point.

In Winter v. Local Union No. 639, 569 F.2d 146 (D.C. Cir. 1977), the District of Columbia Circuit Court of Appeals concluded that the non-exhaustion defense is available only

to a defendant union and not a defendant employer, except for "special circumstances".

D. Conclusion

As is obvious from the discussion above, federal courts in confronting the question whether a defendant employer may assert as a defense the plaintiff's failure to exhaust available intraunion procedures have arrived at three different answers. One line of decisions, including the Ninth Circuit's Clayton Revised Opinion, allows an employer to raise the defense only if the intraunion remedies could have led to reinstatement of the grievance. Other court decisions permit an employer's use of

the defense except when the union remedies would have been inadequate or futile. Other decisions hold the defense is never available to an employer.

This disarray of decisions on the same issue creates a serious conflict among the different Circuit Courts of Appeals. The conflict in fact is so serious that it even has resulted in conflicting decisions by courts within the same Circuit. This situation requires a clarification from the Court. A decision by this Court is required in order to create a uniform law throughout the Circuits. As a result of the present status of the law, a plaintiff with identical facts has a valid claim against his employer

in one of several circuits but no valid claim in a number of other circuits.

III.

THE UNION IS A NECESSARY PARTY WHEN LITIGATION CONCERNS A BREACH OF THE UNION'S DUTY OF FAIR REPRESENTATION

A. Breach Of The Union's Duty Of Fair Representation Is A Threshold Issue

Although the employer is not a necessary party to an action by an employee against his union for breach of the duty of fair representation (Kaiser v. Local No. 83, 577 F.2d 642

(9th Cir. 1978)), the same is not true when an employee attempts to sue his employer for breach of the collective bargaining agreement. The plaintiff may not sue his employer in such a case unless he can first establish that the union has breached its duty of fair representation under the standard set forth in Vaca v. Sipes, supra, and subsequent cases. Proof of the breach of the duty of fair representation is a threshold finding that must be made before the issue of whether or not the collective bargaining agreement was breached. Such a finding may be made in a separate civil suit against the union, prior to the suit against the employer, or it may be made in the same action where the employer is a

defendant, so long as such a finding is made before the court reaches the breach of contract issue. In determining whether or not a breach of the duty of fair representation occurred, the union is not only a necessary party, but an essential party. If the case against the union is dismissed because the plaintiff failed to exhaust his remedies against the union, then the plaintiff's suit must also be dismissed against his employer because the union is no longer a party.

1. The Union As An Indispensable Party Because Of The Duty Of Fair Representation Issue

The opinion in Bradley v. Ford Motor Co., 417 F.Supp. 23 (N.D. Ill.

1975), addresses the question of whether a union is a necessary party, pursuant to Rule 19 of the Federal Rules of Civil Procedure, in a suit against the employer when the union's performance of its duty of fair representation is a question. The court in Bradley stated:

> "The plaintiff seeks reinstatement to his employment and seniority rights, and this remedy would affect the status of other members of the union who are employees of the defendant company. Therefore it seems to us that this case could not proceed without the presence of the union, because the requirements of F.R.C.P. 19 (b) would not have been satisfied ." 417 F.Supp. at 25.

Although in the case of Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), the Sixth Circuit allowed a breach of the duty of fair

representation issue to be decided after dismissing the union, the court did not cite Bradley nor determine if the union was an indispensable party. In fact the question of whether the union was an indispensable party under Rule 19(b) was neither raised nor discussed in the court's opinion.

Other district court decisions in this area provide further guidance. In Johnson v. Colts, Inc., 306 F.Supp. 1076 (D. Conn. 1969), when the plaintiff sued his former employer for wrongful discharge the employer moved for dismissal on the ground that the plaintiff had failed to join the related unions as indispensable parties. The district court denied the motion but ordered that the unions be joined as defendants.

"The primary purpose of joining them as parties is to aid in the Court's interpretation of the collective bargaining agreement [to determine whether the plaintiff was required to use the grievance procedure mechanism]." 306 F.Supp. at 1079.

In Kinnunnen v. American Motors Corp., 56 F.R.D. 102 (E.D. Wis. 1972), the plaintiff brought a §301 suit solely against the employer. The court granted the defendant employer's motion to join the union as a necessary party. The court determined that joinder was mandated in part because "it would be inappropriate for this court to make either determination [that the grievance procedures had been exhausted or that the union had breached its duty of fair representation] without the presence of the unions." 56 F.R.D. at 103.

In Atwood v. Pacific Maritime Ass'n, 432 F.Supp. 491 (D. Ore. 1977), the plaintiffs contended the union was not responsible for any damage and therefore moved to dismiss the unions from the §301 suit. The "most important [reason for denying the motion was that]...it is simply unfair to expect the Employers to litigate and defend the Union against plaintiffs' claim of unfair representation." 432 F. Supp. at 495. The court further explained that the union had the best access to evidence bearing on the alleged breach of the duty of fair representation. "While the Employers certainly have an interest in this issue and may participate in its trial, they should

not be required to assume sole responsibility" for it. Ibid. This reason is even more significant in Clayton, since the litigation already had been proceeding for a substantial period of time with the union as a party. The court in Atwood also noted that the defendant employers had prepared their case relying on the presence of the unions as defendants and could seek joinder of the unions pursuant to Rule 19 if they were dismissed.

2. The Union As An Indispensable Party Because Of The Relief Sought

The district court in Bradley also concluded that the union was a necessary party because the plaintiff sought reinstatement, a form of relief

which if granted would affect the rights of other union member employees. The plaintiff in the case before the bar, also has sought reinstatement to his job with all seniority rights which have accrued since his termination.

A number of federal cases have held that the union is an indispensable party in a §301 suit against an employer where the requested relief, such as reinstatement with the concomitant seniority rights, could affect other union members. See, e.g., Neal v. System Board of Adjustment, 348 F.2d 722, 727-728 (8th Cir. 1965); Townsend v. Exxon, 420 F. Supp. 189, 190 n.1 (D. Mass. 1976); and, Kinnunen v.

American Motors Corp., supra, 56 F.R.D. at 103.

B. The Court Of Appeals Erroneously Concluded That The Employer Would Not Be Materially Prejudiced If The Union Was Dismissed

This Court stated "the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract." Vaca v. Sipes, supra, 386 U.S. at 183 (1967). Because the duty of fair representation claim is so critical in Clayton, the Ninth Circuit Court of Appeals recognizes that its decision will produce a true anomaly.

> "Where the employer raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its members. In an action from which the union has been dismissed, ITT, to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's grievance." Rev. Op. p. 22-23.

As the district court in Atwood, supra, so aptly stated: "[I]t is simply unfair to expect the Employers to litigate and defend the Union against plaintiffs' claim of unfair representation. The Union has best access to the appropriate witnesses and evidence and should defend its own position." 432 F.Supp. at 495.

The Ninth Circuit Court of Appeals in its Revised Opinion

recognizes, as dictated by Vaca v. Sipes, the necessity of apportioning damages between the unions and the employer if the duty of fair representation were breached. The Court of Appeals assumes, however, in reaching its decision to dismiss the Union, and not the Company, that the Union will fully cooperate with the Company, in defending against a claim on which the Union can no longer be held liable.

This implicit assumption exposes a certain degree of naivete about the Union's real interests. Since the Union can no longer bear any liability, proof that it breached the duty would simply assist a union member's interest in achieving victory

on a wrongful discharge claim against an employer.

The Clayton decision in fact encourages collusion in the future between a union and an employee. By colluding, these two parties could circumvent the collective bargaining agreement's grievance and arbitration procedures. Once the Union refuses to pursue a grievance, the employee could purposefully neglect to use the intra-union remedies. The employee then could sue the employer alone and with the union's cooperation prove the union had breached its duty of fair representation. Thereafter, the employee would be free to pursue his original grievance against the employer in court without ever having

had to attempt any alternative administrative procedures and without the union being exposed to any liability.

To avoid such collusion and the resultant flood into federal courts of labor cases which have not passed through the relevant administrative procedures, the Clayton Revised Opinion should be reversed. The Company should be dismissed on the ground that the Employee did not exhaust his intraunion remedies or because of the absence of an indispensable party.

IV.

PLAINTIFF'S FAILURE TO EXHAUST HIS INTRAUNION REMEDIES PREVENTS ANY FINDING THAT THERE HAS BEEN A BREACH OF THE DUTY OF FAIR REPRESENTATION

A. The Nonexhaustion Issue Goes To The Merits Of the Duty Of Fair Representation Claim

The nonexhaustion of intraunion remedies forecloses a finding that the union breached its duty because the DFR can not be breached until the union has had an opportunity to review the claim through its internal procedures. The only exceptions to this principle

are when the member can show an inadequate remedy or that it would be futile to pursue that procedure.

As stated in Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974):

> "If the union's wrongful refusal [to pursue the grievance procedures] were reversed [during the intraunion remedies] without prejudice to his rights, the employee would no longer have a cause of action for breach of the duty of fair representation, and consequently would have no right under Vaca to sue his employer for breach of contract." 381 F.Supp. at 569.

Accordingly, the employee on substantive grounds is precluded from suing for breach of the duty of fair representation. When the employee fails to use the intraunion remedies, he eliminates the union's only opportunity to review its conduct.

The consequence of this fact is that the employee does not have a claim against his employer because he can not establish that a breach of the DFR occurred. As so succinctly stated by the Brookins court, when proof of a breach of the DFR is an impossibility, the employee also is precluded from suing the employer under Vaca v. Sipes. Other courts have agreed with this conclusion. E.g., Fleming v. Chrysler Corp., 416 F.Supp. 1258 (E.D. Mich. 1975), aff'd. 575 F.2d 1187 (6th Cir. 1978), and Aldridge v. Ludwig - Honold Manufacturing, supra.

B. The Intraunion Remedies Available To Plaintiff Are Sufficient To Redress Any Alleged Wrongs

The fact that the Employee could only obtain monetary damages through the internal union procedure was the primary reason the Ninth Circuit reversed the dismissal of the Company.

> "[O]nce the union withdrew its petition for a hearing on his grievance, Clayton lost any opportunity he might have had for reinstatement through the contractual grievance process.... [The union's internal appellate procedures] could neither reinstate Clayton nor reinstate his petition and prosecute his grievance action." Rev. Op. p. 21-22.

The Court of Appeals, by concluding that the intraunion remedies were insufficient, assumes that any remedy other than reinstatement to the employment position in a wrongful discharge case would not be sufficient. However, in De Arroyo v. Sindicato de Trabajadores Packing, 425 F.2d 281 (1st Cir. 1970) the First Circuit Court of Appeals made the following statement:

> "Reinstatement still may not be the appropriate form of prospective relief in this case, however, for it may be that the six year delay since discharge has made reinstatement impractical.... If such impracticality exists, we can see no reason why an award for future lost earnings would not be in order...." 425 F.2d at 292.

In the case at bar there was a delay of more than five years between the time the Employee was terminated and the date of the Revised Opinion by the Ninth Circuit Court of Appeals.

Prospective monetary damages cannot be rejected as an alternative to reinstatement merely because they may be difficult to quantify. Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489, 493 (4th Cir. 1966) citing John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) and Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1956). The Ninth Circuit Court of Appeals totally ignored the availability of prospective monetary damages in concluding that the intra-

union remedies were not sufficient as to the Company. Prospective monetary damages are recognized as a viable alternative to reinstatement as a form of relief in a §301 suit. E.g., Soto Segarra v. Sea-Land Service, Inc., 581 F. 2d 291, 297 (1st Cir. 1978); Richardson v. Communications Workers of America, 443 F.2d 974, 985 (8th Cir. 1971); and, Bowen v. United States Postal Service, 470 F.Supp. 1127, 1131 (W. D. Va. 1979).

Since prospective monetary damages are an acceptable alternative to reinstatement, the Ninth Circuit Court of Appeals was incorrect in ruling that the intraunion remedies were not sufficient to bar the Employee's claim against the Company.

V.

THE COURT OF APPEALS ERRED IN FINDING THAT THE INTRAUNION REMEDIES ARE ADEQUATE AS TO THE UNION

Assuming the foregoing arguments are not accepted, the Company maintains that the Court of Appeals erred in finding that the nonexhaustion defense justified dismissal of the Union. Such dismissal was erroneous because the available intraunion remedies were not sufficient to redress the plaintiff's complaint.

Since the breach of the duty of fair representation occurs when a union " arbitrarily, discriminatorily or in bad faith" refuses to take the employee's grievance to arbitration

(and, as the Company contends, refuses to change its decision in the course of the employee's appeal via intraunion remedies), the only appropriate remedy to make the employee whole would be reinstatement of his grievance. As the Ninth Circuit Court of Appeals has pointed out, this remedy can not be granted through the internal union appellate procedures on the facts of Clayton. Reinstatement of a grievance can only occur if permitted by the terms of the relevant collective bargaining agreement. See, e.g., Harrison, supra. Accordingly, the Union could not have given the Employee adequate relief via the intraunion remedies.

The Ninth Circuit Court of Appeals itself has declared that in order to invoke the nonexhaustion defense "the union must show that there was a procedure available to the members within the union structure reasonably calculated to redress the particular grievance complained of." Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley, 378 F.2d 738, 745 (9th Cir. 1967) [Emphasis added]. The intraunion procedures available in Clayton did not allow for reinstatement of the grievance which was the ultimate relief sought by the employee.

Those cases which have found the UAW's intraunion procedures to be sufficient and fair in treating an

employee's grievance against the union are not determinative here. The Company asserts that the pertinent question is whether the intraunion remedies can reinstate the grievance, which could result in reinstatement to employment. Equity requires that the intraunion remedies be deemed insufficient as to the union unless reinstatement of the grievance at issue is possible.

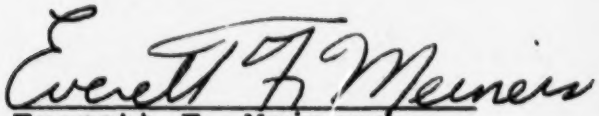
CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and the Revised

Opinion of the Court of Appeals in this case.

Dated: July 9, 1980

Respectfully submitted,



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APPENDIX

FILED
April 14, 1980 Richard H. Deane
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, v. ITT GILFILLAN, etc., et al., Appellant.	)	NO.77-2756
CLIFFORD E. CLAYTON, Appellant, v. ITT GILFILLAN, etc., et al., Appellee.	)	NO.77-2763 REVISED OPINION

Appeal from the United States District Court for the Central District of California Irving Hill, Chief Judge, Presiding Argued and submitted April 4, 1979 Opinion filed September 4, 1979

Before: GOODWIN and KENNEDY, Circuit Judges, and TAYLOR*, District Judge

GOODWIN, Circuit Judge:

Clayton, a discharged employee, appeals from a district court judgment dismissing his action against ITT-Gilfillan for wrongful discharge under section 301 of the Labor Management Relations Act (29 U.S.C. § 185) and

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*The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

against his union for breach of its duty to represent him. We affirm the dismissal in favor of the union, but reverse the judgment in favor of the employer.[1]

For alleged misconduct not material here, ITT fired Clayton in February 1975. As a member of the United Auto Workers (UAW), Clayton was entitled under a collective bargaining agreement to seek reinstatement. He took the first step under the contract, a formal request for reinstatement, but the company denied his request. Clayton's local union then filed a timely grievance, but again the company refused to reinstate him. The union representative next made timely demand under the terms of the

collective bargaining agreement for arbitration of the grievance. For reasons not stated in the record, however, the union eventually withdrew the request for arbitration.

Clayton was notified of the local official's decision not to press for arbitration. Under Article 33 of the union constitution, a member who is not satisfied with the handling of his grievance may appeal to the local's delegate body or general membership meeting. Appeal from either group's decision may next be taken to the International Executive Board. The unsatisfied member may then appeal the Board's decision to the Constitutional Convention Appeals Committee, or in some cases to the Public Review

Board (PRB) established in Article 32 of the union's constitution.

Article 33, section 12, of the union constitution requires any member who feels aggrieved by any action of the local to exhaust his constitutional remedy before appealing to a civil court or governmental agency for redress.

Clayton admits that he did not exhaust his union remedies. He did not appeal the union official's decision not to proceed to arbitration even to the first appellate level provided in Article 33. Instead, he brought this action in federal district court several months later.

Both the union and ITT asserted as affirmative defenses Clayton's

failure to exhaust his union remedies under Fed. R. Civ. P. 42. The court found that (1) Clayton had failed to exhaust his remedies, (2) the remedies available to Clayton through the union appeals process were adequate to redress his grievance, and (3) exhaustion of internal remedies could not be excused as futile. As a matter of law, therefore, the district court held that Clayton could not maintain an action against either defendant.

1. The union's exhaustion defense. The exhaustion of internal remedies as a condition of maintaining an action against the union is a matter of judicial discretion.[2] Buzzard v. Local Lodge 1040, 480 F.2d 35, 41 (9th Cir. 1973); Keeffe Brothers v.

Teamsters Local No. 592, 562 F.2d 298, 302-03 (4th Cir. 1977) (citing cases). Relying principally on Buzzard and Newgent v. Modine Manufacturing Co., 495 F.2d 919 (7th Cir. 1974), the district court held that Clayton's failure to exhaust his union remedies as required by the union constitution prevented him from suing the union. We agree.

There is no question that Article 32, section 12, of the union constitution made exhaustion mandatory here. Exhaustion is excused only if the remedies available are inadequate or if resort to the internal procedures would be futile. Buzzard v. Local Lodge 1040, supra, 480 F.2d at 41; Baldini v. Local No. 1095, 581 F.2d 145, 149 (7th Cir. 1978).

Clayton contends that the internal appeals process was inadequate because the union could not reinstate him to his job. The union could "only" award him money for any wrong it had caused, he complains.

Many courts examining the same internal remedies as those provided to Clayton have found them fair and adequate. See Baldini v. Local No. 1095, 581 F.2d at 149 (citing cases). In Baldini, the Seventh Circuit upheld the UAW procedures against an objection identical to that raised by Clayton. The ability to award only money damages does not make the process inadequate; relief against the union in the civil action Clayton now brings would give him no more. A primary rea-

son for requiring exhaustion is to forestall unnecessary interference with union affairs. Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). It follows that exhaustion makes especially good sense when the courts can give no different relief than that provided by the union.

More important in this case is the aid that exhaustion would have furnished the courts in deciding Clayton's claim against the union.

> "A primary reason for the existence of the exhaustion doctrine is that prior union action interpreting union rules and perhaps also further refining and defining the problem may well assist the court when it is later called upon to resolve the controversy." Buzzard v. Local Lodge 1040, 480 F.2d at 41.

The UAW's liability (if any) for breach of its duty of fair representation would depend on the reasons for the union's withdrawal of the arbitration request. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But the missing motive is precisely the sort of information that an appellate body within the union would have elicited, compiling a record that would greatly assist the court now.[3]

For all these reasons, the district court acted well within its discretion when it dismissed Clayton's claim against the union for failure to exhaust. Clayton failed to give his union the opportunity to reverse

itself. He cannot obtain by judgment now what he would not allow the union an opportunity to afford him under its constitution.

2. Claim against the employer.

We next consider whether, as the district court held, Clayton's failure to exhaust internal union remedies barred his action against his employer for wrongful discharge. This circuit has discussed the validity of the employer's asserted exhaustion defense in dictum, but it has never directly decided the issue.[4] We now find that if a claimant, by exhausting internal union remedies, could not obtain the same relief sought in a civil action against an employer, the employer may

not raise the failure to exhaust internal remedies as a defense.

While exhaustion of union remedies is not a condition precedent to maintaining an action against an employer, the employer is protected to a substantial degree by the exclusivity of the collective bargaining agreement's arbitration remedy. Exhaustion of the remedies provided in the agreement is required prior to a breach-of-contract action when those remedies are exclusive. Vaca v. Sipes, 386 U.S. 171, 184 (1967).[5] Remedies are presumed to be exclusive where, as here, the parties to the agreement do not expressly provide that the grievance and arbitration procedures are not the exclusive remedy. Republic Steel Corp.

v. Maddox, 379 U.S. 650, 657-58 (1965).

The requirement of exhaustion of collective bargaining remedies may thus bar an employee's action against an employer. Otero v. Electrical, Radio and Machine Workers, 474 F.2d 3 (9th Cir. 1973). It is typically the employee's union, however, and not the employee himself that controls initiation of arbitration or other remedies. Therefore, an exception to the exhaustion doctrine is recognized. Where, as here, the union has sole power to invoke arbitration, the employee can obtain judicial relief for breach of the employment contract only if he first shows that the union wrongfully refused to seek arbitration. Vaca v.

Sipes, 386 U.S. at 185. See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Beriault v. Local 40, 501 F.2d 258 (9th Cir. 1974). To be wrongful, however, the failure must be "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. at 190.

The instant case differs from Vaca and Hines, the leading cases in this area. The employee's failure to exhaust against the union was not an issue in those cases. In both, the discharged employee faced no exhaustion barrier to union liability for failure to represent him. Here, ITT contends that Clayton's failure to

exhaust his intraunion remedies precluded a showing that the UAW's failure to prosecute his grievance was "wrongful," barring his action for wrongful discharge.

It is initially useful, in determining the applicability of an exhaustion defense in this context, to distinguish two types of exhaustion requirements and the policies underlying each. The first, discussed above, requires union members to pursue all remedies under a union's constitution and bylaws before bringing actions against the union. As noted, this exhaustion requirement prevents unnecessary judicial interference in union disputes and conserves judicial resources.

The second type of exhaustion requirement compels unions or individual employees to follow all grievance procedures under a collective bargaining agreement before resorting to judicial remedies against employers. Exhaustion under the collective bargaining agreement prevents parties to the agreement from "short-circuiting" an agreed upon grievance procedure by resort to the courts. This is consistent with the policy preference, declared in section 203 of the Taft-Hartley Act, that, if at all possible, labor disputes should be resolved within the framework of procedures approved under collective bargaining, rather than in the courts. 29 U.S.C. § 173(d). This primary commitment to

private dispute resolution has been emphasized in a series of landmark Supreme Court labor decisions. See, e.g., Hines v. Anchor Motor Freight, Inc., supra; Vaca v. Sipes, supra; Republic Steel Corp. v. Maddox, supra.

There are good reasons, then, for requiring union members to exhaust procedures under union constitutions or bylaws before bringing actions against unions and for compelling employees to fully pursue collective bargaining remedies before bringing judicial action against employers. But are there good reasons for transferring the intraunion exhaustion requirement from the union member versus union context to cases in which

employees sue employers for wrongful discharge?

In support of this extension, ITT argues that if an employee does not exhaust internal remedies, he or she is estopped from showing that the union acted "wrongfully," as is required by Vaca and Hines. The company claims that if Clayton had pursued his internal remedies after the union had declined to process his grievance, the UAW might have reversed itself and the Vaca-Hines union "wrongfulness" standard would not have been satisfied. This argument was most cogently described in Brookins v. Chrysler Corp., 381 F.Supp. 563, 568-69 (E.D. Mich. 1974):

"By exhausting his internal remedies the employee may be able to eliminate the very wrong of which he complains, not merely obtain a remedy therefor in another forum. If the union's wrongful refusal to continue the grievance were reversed without prejudice to his rights, the employee would no longer have a cause of action for breach of duty of fair represenation, and consequently would have no right under Vaca to sue his employer for breach of contract." 381 F.Supp. at 569.

We find this analysis persuasive. But it does not apply in instances when the employee, by exhausting intraunion remedies, would not "be able to eliminate the very wrong of which he [or she] complains." That is the case here.

The rationale for requiring a showing of "wrongful" conduct in the Vaca-Hines context, as noted, is to prevent the circumvention of collec-

tively bargained grievance procedures. A party should be barred from seeking in court what might still be obtained through private contractual remedies. Allowing the employer to raise intra-union exhaustion as a defense, if exhaustion could have resulted in a claimant obtaining the same relief he or she seeks in a civil action, promotes private dispute resolution.[6] Accordingly, the employer's exhaustion defense is properly recognized in those circumstances.

If, however, an aggrieved party cannot obtain adequate relief through contractual or internal grievance procedures, the dispute resolution rationale is inapplicable. There is no reason, consistent with Vaca,

Hines, et al., to require exhaustion if, regardless of the outcome of a full grievance procedure, a claimant will be compelled to resort to judicial process.

Here, once the union withdrew its petition for a hearing on his grievance, Clayton lost any opportunity he might have had for reinstatement through the contractual grievance process. Even if Clayton had successfully appealed the withdrawal of the hearing request and the union had reversed itself and found that it should have processed his grievance, the union's public review board could do no more than award him damages for breach of its duty of fair representation. It could neither reinstate

Clayton nor reinstate his petition and prosecute his grievance action. We conclude that Clayton's claim against ITT was not barred by failure to exhaust such insufficient remedies. See Winter v. Local 639, Int'l Brotherhood of Teamsters, 569 F.2d 146, 150-51 (D.C. Cir. 1977); Harrison v. Chrysler Corp., supra. Accord, Margetta v. Pam Pam Corporation, 501 F.2d 179, 180 (9th Cir. 1974); Fruit & Vegetable Packers, Local 760 v. Morley, 378 F.2d 739, 745 (9th Cir. 1967).

Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer raises the affirmative

defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its members. In an action from which the union has been dismissed, ITT, to prevail on its affirmative defense, must defend the UAW's good faith in declining to presecute Clayton's grievance.

We are aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. On the contrary, the cases compel the result we reach.

In Vaca, the Supreme Court said that the union's wrongful refusal to process a grievance could not defeat the employee's right to judicial relief against the employer, even though "the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." 386 U.S. at 185. This means that the protection afforded to an employer by the collective bargaining agreement is conditional on the union's discharge of its duty to represent an employee fairly. Hines v. Anchor Motor Freight, Inc., 424 U.S. at 571. The Court recognized that this in turn means courts will have to pass on

whether there has been a breach of the duty of fair representation in actions for breach of the employment contract. Vaca v. Sipes, 386 U.S. at 187.[7] To hold here that Clayton has no cause of action against ITT because of his union's failure to proceed to arbitration would run counter to the basic principles of Vaca and Hines.

We must therefore remand this case. ITT will be liable only if (a) the union's withdrawal of its demand for arbitration was wrongful, as that term has been construed in Vaca, Hines, and other cases, and (b) Clayton's discharge was a breach of contract. See Hines v. Anchor Motor Freight, Inc., 424 U.S. at 570-71.[8]

We note also that, although the union will incur no liability because of Clayton's failure to exhaust internal remedies, the extent of the union's wrong (if any) can affect the relief granted against ITT.

> "If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, at least in some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. * * * The governing principle, then, is to apportion liability * * * according to the damage caused by the fault of each." Vaca v. Sipes, 386 U.S at 187, 197.

See also Hines v. Anchor Motor Freight, Inc., 424 U.S. at 572-73 (Stewart, J., concurring). Hampered as we are by the lack of information about why the union dropped its arbitration demand, we can offer no better

advice to the district court on remand.

Reversed and remanded for trial on the claim against the employer only. The judgment dismissing the claim against the union is affirmed.

FOOTNOTES:

[1]Defendant ITT also cross-appeals from the district court's refusal to strike plaintiff's prayer for attorney's fees, punitive damages and damages for emotional distress. This was neither a final judgment under 28 U.S.C. § 1291 nor an interlocutory order appealable under 28 U.S.C. § 1292. It is therefore not reviewable at this time.

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[2]Some courts have found that the duty of a union to represent its members arises from tort or contract law, but

we have held that the duty of fair representation is a matter of federal statute. Price v. Southern Pacific Transportation Co., 586 F.2d 705, 753 (9th Cir. 1978); see also Retana v. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018, 1021-22 (9th Cir. 1972). Judicial discretion to require exhaustion derives from 29 U.S.C. § 411(a)(4), which says:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * : Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * * ." (Emphasis added.)

[3]The policies warranting a requirement of exhaustion of intraunion remedies in suits between union members and unions or union officers were succinctly described in Simpson & Berwick, "Exhaustion and the Individual Employee," 51 Tex. L. Rev. 1179 (1973):

> "Conservation of judicial resources was one policy underpinning the doctrine. Also, courts agreed that administrative filtration served to sharpen grievances for eventual judicial resolution, assisting judges faced with unfamiliar rules and practices. Moreover, requiring resort to internal private remedies was thought to stimulate honest, democratic grievance procedures. Finally, some courts feared that a contrary rule would encourage a flood of litigation, sapping the effectiveness of internal procedures." Id. at 1216-17.

[4]In Retana v. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018 (9th Cir. 1972), the court explicitly stated that an employer could not raise the intra-union exhaustion defense, but this statement is included in a footnote which ITT properly characterize as "dictum." Id. at 1027 n. 16. See Winter v. Local No. 639, Int'l Brotherhood of Teamsters, 569 F.2d 146, 150 n. 22 (D.C. Cir. 1977), and Simpson & Berwick, supra, note 3, at 1223, n. 212, (both referring to Retana footnote 16 as "dictum"). It should be noted, however, that Retana footnote 16 has been cited by other courts for the proposition that an employer cannot raise the intra-union exhaus-

tion defense. See Fitzer v. Safeway Stores, 586 F.2d 182, 184 (10th Cir. 1978); Harrison v. Chrysler Corp., 558 F.2d 1273, 1278 (7th Cir. 1977).

We also note that in Kepard v. International Harvester Co., 581 F.2d 764 (9th Cir. 1978), our court affirmed the dismissal of an employee's claim against his union because he had failed to exhaust his intraunion remedies, but reached the merits of the employee's claim against his employer for back pay. There is no indication, however, that the company attempted to raise Keppard's failure to exhaust as a defense. The opinion does not refer to, much less reject, any reliance by the employer on an internal exhaustion defense.

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[5]Most of those parts of Vaca v. Sipes concerning employee section 301 actions for wrongful discharge are dicta. See 386 U.S. at 199-202 (Fortas, J., concurring). The holding in Vaca concerned only the federal courts' jurisdiction of employee causes of action against a union for failure to represent. But we have indicated that we agree with Vaca's discussion relating to claims against an employer. Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

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[6]The Seventh Circuit recognized and thoughtfully described the reasons for allowing the employers to raise a qualified intraunion exhaustion defense

in Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977):

"We are not persuaded, however, that exhaustion of intraunion remedies is never a legitimate concern of the employer. In Orphan v. Furnco Construction Corp., supra, at 801, we gave serious consideration to an employer's argument that permitting it to raise the defense would facilitate the national labor policy in favor of the private adjustment of grievances. That argument has some merit. Under certain circumstances an employee's appeal within the union, after a union official's bad faith refusal to press his grievance, might place the grievance procedure back on its proper course. A rule requiring such action would directly and substantially benefit the employer by enabling it to rely on the integrity of the grievance procedure in all cases in which it has not been irretrievably spoiled by the union's unfair representation.

"The question presented is whether the employee owes an obligation to the employer to exhaust available methods of reviving a stalled grievance procedure before abandoning that procedure and resorting to the courts for relief. We believe such an obligation is implied under a collective bargaining

agreement which, like the one in this case, reposes in the union exclusive authority to represent the employee in contractual claims against the employer and which provides grievance machinery as the exclusive method of resolving those claims. It is clear that such provisions may not preclude the employee from seeking judicial relief independently if the union irreversibly defaults on its obligation to represent him fairly. Hines v. Anchor Motor Freight, Inc., supra, at 567, 96 S.Ct. 1048. However, no valid reason appears for relieving the employee from the operation of these provisions, requiring his reliance on the union for representation and the grievance procedure for relief, so long as the procedure remains viable and fair representation can be obtained. Intraunion appellate procedures may be a method by which fair representation may be regained and the grievance procedure revived. The employer may properly assert that the employee has an obligation under the collective bargaining agreement to resort to intraunion appellate procedures for this limited purpose. To raise this defense, however, the employer must establish that an intraunion appeal could result in reversal of the union's refusal to press the grievance and that the grievance could be reinstated in accordance

with the provisions of the collective bargaining agreement. Orphan v. Furnco Construction Corp., supra, at 801. Moreover, even where such an opportunity exists, the employee may be relieved of the exhaustion requirement where resort to the intra-union appellate procedures would be futile. Id. at 802." Id. at 1287-79.

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[7]The necessity of reviewing the union's activities in trying a claim against the employer was a main reason for Mr. Justice Black's dissent in Vaca. "Henceforth, in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith." 386 U.S. at 210.

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[8]The Sixth Circuit reaches the same conclusion in a similar situation.

In Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), a discharged employee brought an action against his union for breach of the duty of fair representation, against his former employer for wrongful discharge under section 301, and against both for conspiracy. The conspiracy and unfair representation claims were barred by the statute of limitations. This left the section 301 claims against the employer. The court noted that the company could be only liable if the employee showed that the union had acted wrongfully under the test of Hines as a prerequisite to his section 301 claim. The company would therefore defend on the basis of union conduct when the statute of limitations

guaranteed the nonappearance of the union as a party. But dismissal of the claims against the union was held irrelevant to the employee's ability to proceed against the employer. 580 F.2d at 218-19.

OPINION FILED AND
JUDGMENT ENTERED
April 14, 1980
Richard H. Deane
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, vs. ITT GILFILLAN, etc., et al., Appellant.	No. 77-2756
CLIFFORD E. CLAYTON, Appellant, vs. ITT GILFILLAN, etc., et al., Appellee.	No. 77-2763 O R D E R

Before: GOODWIN and KENNEDY, Circuit Judges, and TAYLOR*, District Judge

The opinion filed hereon September 4, 1979, is withdrawn and the clerk is directed to file the attached revised opinion.

With the filing of the revised opinion, the panel votes to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and of the panel's revised opinion, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b) and G.O. 5.3.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

FILED
Sept. 4, 1979 Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD E. CLAYTON, Appellee, v. ITT GILFILLAN, etc., et al., Appellant.	NO.77-2756
CLIFFORD E. CLAYTON, Appellant, v. ITT GILFILLAN, etc., et al., Appellee.	NO.77-2763 OPINION

Appeal from the
United States District Court for the
Central District of California

Before: GOODWIN and KENNEDY, Circuit Judges, and TAYLOR*, District Judge

GOODWIN, Circuit Judge:

Clayton, a discharged employee, appeals from a district court judgment dismissing his action against ITT-Gilfillan for wrongful discharge under section 301 of the Labor Management Relations Act (29 U.S.C. § 185) and against his union for breach of its duty to represent him. We affirm the dismissal in favor of the union, but reverse the judgment in favor of the employer.[1]

For alleged misconduct not material here, ITT fired Clayton in February 1975. As a member of the United

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* The Honorable Fred M. Taylor, United States District Judge for the District of Idaho, sitting by designation.

Auto Workers (UAW), Clayton was entitled under a collective bargaining agreement to seek reinstatement. He took the first step under the contract, a formal request for reinstatement, but the company denied his request. Clayton's local union then filed a timely grievance, but again the company refused to reinstate him. The union representative next made timely demand under the terms of the collective bargaining agreement for arbitration of the grievance. For reasons not stated in the record, however, the union eventually withdrew the request for arbitration.

Clayton was notified of the local official's decision not to press for arbitration. Under Article 33 of

the union constitution, a member who is not satisfied with the handling of his grievance may appeal to the local's delegate body or general membership meeting. Appeal from either group's decision may next be taken to the International Executive Board. The unsatisfied member may then appeal the Board's decision to the Constitutional Convention Appeals Committee, or in some cases to the Public Review Board (PRB) established in Article 32 of the union's constitution.

Article 33, section 12, of the union constitution requires any member who feels aggrieved by any action of the local to exhaust his constitutional remedy before appealing to a

civil court or governmental agency for redress.

Clayton admits that he did not exhaust his union remedies. He did not appeal the union official's decision not to proceed to arbitration even to the first appellate level provided in Article 33. Instead, he brought this action in federal district court several months later.

Both the union and ITT asserted as affirmative defenses Clayton's failure to exhaust his union remedies. The district court ordered a separate trial on exhaustion, under Fed. R. Civ. P. 42. The court found that (1) Clayton had failed to exhaust his remedies, (2) the remedies available to Clayton through the union appeals

process were adequate to redress his grievance, and (3) exhaustion of internal remedies could not be excused as futile. As a matter of law, therefore, the district court held that Clayton could not maintain an action against either defendant.

1. The union's exhaustion defense.

The exhaustion of internal remedies as a condition of maintaining an action against the union is a matter of judicial discretion.[2] Buzzard v. Local Lodge 1040, 480 F.2d 35, 41 (9th Cir. 1973); Keeffe Brothers v. Teamsters Local No. 592, 562 F.2d 298, 302-03 (4th Cir. 1977) (citing cases). Relying principally on Buzzard and Newgent v. Modine Manufacturing Co.,

495 F.2d 919 (7th Cir. 1974), the district court held that Clayton's failure to exhaust his union remedies as required by the union constitution prevented him from suing the union. We agree.

There is no question that Article 32, section 12, of the union constitution made exhaustion mandatory here. Exhaustion is excused only if the remedies available are inadequate or if resort to the internal procedures would be futile. Buzzard v. Local Lodge 1040, 480 F.2d at 41; Baldini v. Local No. 1095, 581 F.2d 145, 149 (7th Cir. 1978).

Clayton contends that the internal appeals process was inadequate because the union could not reinstate

him to his job. The union could "only" award him money for any wrong it had caused, he complains.

Many courts examining the same internal remedies as those provided to Clayton have found them fair and adequate. See Baldini v. Local No. 1095, 581 F.2d at 149 (citing cases). In Baldini, the Seventh Circuit upheld the UAW procedures against an objection identical to that raised by Clayton. The ability to award only money damages does not make the process inadequate; relief against the union in the civil action Clayton now brings would give him no more. A primary reason for requiring exhaustion is to forestall unnecessary interference with union affairs. Brady v.

Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969). It follows that exhaustion makes especially good sense when the courts can give no different relief than that provided by the union.

More important in this case is the aid that exhaustion would have furnished the courts in deciding Clayton's claim against his employer.

> "A primary reason for the existence of the exhaustion doctrine is that prior union action interpreting union rules and perhaps also further refining and defining the problem may well assist the court when it is later called upon to resolve the controversy." Buzzard v. Local Lodge 1040, 480 F.2d at 41.

As explained in the next section, ITT's liability (if any) depends on the reasons for the UAW's refusal to

prosecute Clayton's grievance. There is little in the record to indicate why the local official changed his mind and withdrew the arbitration request. But the missing motive is precisely the sort of information that an apellate body within the union would have elicited, compiling a record that would greatly assist the courts now.

For all these reasons, the district court acted well within its discretion when it dismissed Clayton's claim against the union for failure to exhaust. Clayton failed to give his union the opportunity to reverse itself. He cannot obtain by judgment now what he would not allow the union an opportunity to afford him under its constitution.

2. Claim against the employer.

The district court also held that the failure to exhaust union remedies barred Clayton's action against his employer for wrongful discharge. This ruling was inconsistent with a decision filed after this case was tried. Keppard v. International Harvester Co., 581 F.2d 764 (9th Cir. 1978.) Ordinarily, the failure to exhaust union remedies bars only claims against the union, not those against the employer. Brady v. Trans World Airlines, Inc., supra.

In Brady, where there were also claims for wrongful discharge and failure to represent, the Third Circuit held that failure to exhaust union remedies barred only the latter

claim. "Insofar as the first claim is concerned, * * * because it involved the propriety of the discharge, and thus the employment relationship, Mr. Brady was not required to exhaust his internal union remedies." 401 F.2d at 104. We have explicitly accepted this holding of Brady. Retana v. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018, 1027 n.16 (9th Cir. 1972). We applied the rule in Keppard v. International Harvester Co., supra, although the employer was found not liable on other grounds. 581 F.2d at 767.

ITT cites Aldridge v. Ludwig-Honold Manufacturing Co., 385 F.Supp. 695, 697 (E.D. Pa.), aff'd mem., 517 F.2d 1397 (3d Cir.), cert. denied, 423

U.S. 937 (1975), where failure to exhaust union remedies was held to bar claims against both union and employer for wrongful discharge. But the holding in Aldridge is inconsistent with Brady. We followed the Brady rule in Keppard, and are bound by our holding.

While exhaustion of union remedies is not a condition precedent to maintaining an action against an employer, the employer is protected to a substantial degree by the exclusivity of the collective bargaining agreement's arbitration remedy. Exhaustion of the remedies provided in the agreement is required prior to a breach-of-contract action when those remedies are exclusive. Vaca v. Sipes, 386 U.S. 171, 184 (1967).[3] Remedies are

presumed to be exclusive where, as here, the parties to the agreement do not expressly provide that the grievance and arbitration procedures are not the exclusive remedy. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965).

The requirement of exhaustion of collective bargaining remedies may thus bar an employee's action against an employer. Otero v. Electrical, Radio and Machine Workers, 474 F.2d 3 (9th Cir. 1973). It is typically the employee's union, however, and not the employee himself that controls initiation of arbitration or other remedies. Therefore, an exception to the exhaustion doctrine is recognized. Where, as here, the union has sole

power to invoke arbitration, the employee may obtain judicial relief for breach of the employment contract if he can first show that the union wrongfully refused to seek arbitration. Vaca v. Sipes, 386 U.S. at 185. See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Beriault v. Local 40, 501 F.2d 258 (9th Cir. 1974). To be wrongful, however, the failure must be "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. at 190.

The instant case differs from Vaca and Hines, the leading cases in this area. The employee's failure to exhaust against the union was not an

issue in those cases. In both, the discharged employee faced no exhaustion barrier to union liability for failure to represent him. In finding that the employer could be liable if the union wrongfully refused to demand arbitration (Vaca) or if it did proceed to arbitration but failed to represent the employee fairly (Hines), the Supreme Court required trials in which the union's conduct would be litigated with the union as a party.

In this case, Clayton must show wrongful union conduct in order to recover from ITT. By the same token, if Clayton does not prove a culpable default by his union, he will lose his case against his employer. But unlike Vaca and Hines, the union will not be a

party on remand here: Clayton's failure to exhaust means the UAW cannot be liable. This leaves ITT in the anomalous position of defending the union's good faith in an action in which the union is absent.

We are aware of the anomaly. But we have not been directed to any authority that would permit the employer to escape liability if the trier eventually finds that the employee did not receive the minimum representation his union owed him. On the contrary, the cases compel the result we reach.

In Vaca, the Supreme Court said that the union's wrongful refusal to process a grievance could not defeat the employee's right to judicial relief against the employer, even though

"the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." 386 U.S. at 185. This means that the protection afforded to an employer by the collective bargaining agreement is conditional on the union's discharge of its duty to represent an employee fairly. Hines v. Anchor Motor Freight, Inc., 424 U.S. at 571. The Court recognized that this in turn means courts will have to pass on whether there has been a breach of the duty of fair representation in actions for breach of the employment contract. Vaca v. Sipes, 386 U.S. at 187.[4] To hold here that Clayton has no cause of action against ITT be-

cause of his union's failure to proceed to arbitration would run counter to the basic principles of Vaca and Hines.

We must therefore remand this case. ITT will be liable only if (a) the union's withdrawal of its demand for arbitration was wrongful, as that term has been construed in Vaca, Hines, and other cases, and (b) Clayton's discharge was a breach of contract. See Hines v. Anchor Motor Freight, Inc., 424 U.S. at 570-71.[5]

We note also that, although the union will incur no liability because of Clayton's failure to exhaust internal remedies, the extent of the union's wrong (if any) can affect the relief granted against ITT.

"If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, at least in some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. * * * The governing principle, then, is to apportion liability * * * according to the damage caused by the fault of each." Vaca v. Sipes, 386 U.S at 187, 197.

See also Hines v. Anchor Motor Freight, Inc., 424 U.S. at 572-73 (Stewart, J., concurring). Hampered as we are by the lack of information about why the union dropped its arbitration demand, we can offer no better advice to the district court on remand.

Reversed and remanded for trial on the claim against the employer only. The judgment dismissing the claim against the union is affirmed.

FOOTNOTES:

[1]Defendant ITT also cross-appeals from the district court's refusal to strike plaintiff's prayer for attorney's fees, punitive damages and damages for emotional distress. This was neither a final judgment under 28 U.S.C. § 1291 nor an interlocutory order appealable under 28 U.S.C. § 1292. It is therefore not reviewable at this time.

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[2]Some courts have found that the duty of a union to represent its members arises from tort or contract law, but

we have held that the duty of fair representation is a matter of federal statute. Price v. Southern Pacific Transportation Co., 586 F.2d 705, 753 (9th Cir. 1978); see also Retana v. Apartment, Motel and Hotel Elevator Operators, Local No. 14, 453 F.2d 1018, 1021-22 (9th Cir. 1972). Judicial discretion to require exhaustion derives from 29 U.S.C. § 411(a)(4), which says:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency * * * : Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof * * * ." (Emphasis added.)

[3]Most of those parts of Vaca v. Sipes concerning employee section 301 actions for wrongful discharge are dicta. See 386 U.S. at 199-202 (Fortas, J., concurring). The holding in Vaca concerned only the federal courts' jurisdiction of employee causes of action against a union for failure to represent. But we have indicated that we agree with Vaca's discussions relating to claims against an employer. Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974).

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[4]The necessity of reviewing the union's activities in trying a claim against the employer was a main reason for Mr. Justice Black's dissent in Vaca. "Henceforth, in almost every

§ 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith." 386 U.S. at 210.

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[5]The Sixth Circuit reaches the same conclusion in a similar situation. In Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir. 1978), a discharged employee brought an action against his union for breach of the duty of fair representation, against his former employer for wrongful discharge under section 301, and against both for conspiracy. The conspiracy and unfair representation claims were barred by the statute of

limitations. This left the section 301 claims against the employer. The court noted that the company could only be liable if the employee showed that the union had acted wrongfully under the test of Hines as a prerequisite to his section 301 claim. The company would therefore defend on the basis of union conduct when the statute of limitations guaranteed the nonappearance of the union as a party. But dismissal of the claims against the union was held irrelevant to the employee's ability to proceed against the employer. 580 F.2d at 218-19.

Re: Clayton v. ITT Gilfillan, Nos. 77-2756 and 77-2763 KENNEDY, Circuit Judge, concurring:

This circuit does appear to have endorsed, although not as a result of detailed analysis, the rule that "(f)ailure to exhaust internal union remedies (cannot) be urged by the employer as a defense in a suit by the employee for wrongful discharge, " Retana v. Apartment Elevator Operators Union, 453 F.2d 1018, 1027 n.16 (9th Cir. 1972); Keppard v. International Harvester Co., 581 F.2d 764 (9th Cir. 1978). I have some reservations as to the wisdom of this rule, but I agree the court's disposition in this case

accords with the prior case law, and I therefore concur.

/s/ Anthony M. Kennedy
United States Circuit Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD E. CLAYTON PLAINTIFF(S) vs. ITT GILFILLAN, et al., DEFENDANT(S)	CASE NUMBER CV 76-0730- NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that JUDGMENT in the above entitled case was entered in the docket on May 31, 1977.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties.) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on May 31, 1977, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

LEVY, KOSZDIN
GOLDSMITH &
SROLOFF
3550 Wilshire
Bvd., Ste. 1020
LA, CA. 90010

PARKER, MILLIKEN,
KOHLMEIER, CLARK &
O'HARA
Security Pacific
Plaza 27th Fl.
330 So. Hope St.
LA, CA. 90071

MATHEW B.F. BIREN
3550 Wilshire Blvd., Ste. 1020
LA, CA. 90010

EDWARD M. KRITZMAN, CLERK

By /s/ Maru Zeledon
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

FILED
May 27, 1977
Clerk, U.S. District Court
Central District
of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFFORD E. CLAYTON, Plaintiff, -vs- ITT GILFILLAN, A Division of International Telephone and Telegraph Corporation; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, an unincorporated labor organization; UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 509, an unincorporated labor organization, Defendants.	CIVIL NO. 76-0730-H FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial on May 3, 4, and 5, 1977, the Court, having considered the testimony, exhibits, and oral argument, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, CLIFFORD E. CLAYTON was, prior to his discharge in February, 1975 an employee of Defendant ITT GILFILLAN and a member of Defendant INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (hereafter referred to as "International Union"), and UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO.

509 (hereafter referred to as "Local 509").

2. Defendants ITT Gilfillan, International Union, and Local 509 were signatory to a collective bargaining agreement which governed the terms and conditions of Plaintiff's employment at ITT Gilfillan and said collective bargaining agreement was in full force and effect during the period from March 1, 1973 through February 29, 1976.

3. Plaintiff was a member in good standing of Local 509 and the International Union at all times material hereto.

4. In February, 1975, Plaintiff was discharged by Defendant ITT Gilfillan for violation of Company Rule 5

which prohibits lewd, indecent and immoral behavior on said Defendant's premises.

5. In response to said discharge, Plaintiff timely filed a grievance in accordance with the grievance procedure contained in the collective bargaining agreement.

6. After processing the grievance through Step III of the grievance procedure, Ralph Gazzigli, the International Representative of the International Union servicing Defendant Local 509, in his capacity as Representative of Local 509 timely requested arbitration of Plaintiff's grievance. Subsequently, Mr. Gazzigli decided, that the request for arbitration should be withdrawn. Plaintiff

was notified of this decision by his receiving a copy of a letter dated July 11, 1975. (Pl. Ex. 3).

7. Article 32 and 33 of the Constitution of the International Union provide internal union remedies for members of the International Union who are aggrieved by actions of a local union or the international union or any representatives thereof. The procedures provided by Articles 32 and 33 of the International Constitution are incorporated into Article VI of the By-Laws of Defendant Local 509. It was stipulated at trial that Plaintiff failed to initiate, let alone exhaust the internal union remedies provided in the International Constitution and the By-Laws of Local 509. More specif-

ically, Plaintiff failed to take the following steps:

(a) Plaintiff failed to appeal the refusal to arbitrate his case to the membership of Local 509 as required by Article 33, Section 3 of the Constitution of the International Union.

(b) Plaintiff failed to appeal to the Public Review Board and/or International Executive Board as provided by Articles 32 and 33 of the Constitution of the International Union and by Article VI of the By-Laws of Defendant Local 509.

8. All the procedures mentioned in finding No. 7, supra, were available to Plaintiff. The Constitution of the International Union reasonably

advised Plaintiff about his intra-union appeal rights. Moreover, Plaintiff was specifically advised about his intra-union rights by Bob Laster, President of Local 509. Mr. Laster specifically advised Plaintiff about Articles 32 and 33 of the International Constitution and about the rights of appeal to the Public Review Board.

9. In addition, the International Union mailed Plaintiff copies of Solidarity, the official newspaper of the International Union, which advised Plaintiff and other members of the availability of the intra-union remedies. The Articles from Solidarity included a solicitation for members to telephone the Public Review

Board if they had any questions about its operations or how to initiate the procedures of the Public Review Board. The address to which the copies of Solidarity were sent since August, 1974 was Plaintiff's correct address. Upon occasion, Plaintiff read Articles from Solidarity, but, at other times, he did not bother to read the copies of Solidarity which he received.

10. Plaintiff had become familiar with the intra-union appeal procedures because he had previously seen and participated in an appeal made to the Local 509 Membership by one of its members.

11. Plaintiff was uniquely sensitive to his legal rights and pursued

them in numerous ways, including the following:

(a) Plaintiff filed a charge with the National Labor Relations Board with respect to his discharge.

(b) Plaintiff also filed charges with the Equal Employment Opportunity Commission and the Fair Employment Practices Commission of the State of California with respect to his discharge.

(c) Plaintiff filed a claim for unemployment benefits with the State of California. When his claim for benefits were initially denied, Plaintiff requested a hearing and ultimately prevailed in said hearing. The hearings regarding Plain-

tiff's unemployment benefits occurred in the months of July and August, 1975.

12. Plaintiff was represented by counsel during his unemployment benefit hearings. The unemployment hearings took place during the time within which Plaintiff was required by Articles 32 and 33 of the International Constitution to initiate the internal union appeal procedures. Plaintiff sought advice from his counsel regarding his rights against Defendants. Plaintiff was advised by counsel to seek other counsel for further guidance in these matters.

13. At all times material hereto, the Public Review Board had the power to grant a range of possible relief, including the award of mone-

tary damages, which would be appropriate and adequate in the instant case.

14. No evidence was presented at time of trial which indicated that the pursuit of the intra-union remedies by Plaintiff would have been futile for any reason. More specifically, no evidence was presented which indicated that there would have been a preordained negative result if Plaintiff had pursued the intra-union remedies.

15. All Findings of Fact set forth under the heading "Conclusions of Law" are hereby incorporated by reference herein.

CONCLUSIONS OF LAW

1. All Conclusions of Law appearing under the heading "Findings of Fact" are hereby incorporated by reference.

2. This Court has jurisdiction over the subject matter of the instant case pursuant to 28 U.S.C. §1337 and 29 U.S.C. §185(a).

3. The exhaustion of internal union remedies is a prerequisite to the initiation of a lawsuit by a Union member who feels aggrieved by the actions of his Union. Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959. (29 U.S.C. §411(a)(4)). Moreover, the Courts have enunciated the public policy that

a union member may not sue his union if he has bypassed union remedies through which a union member may obtain an impartial examination of his dispute with the union. See, e.g., Buzzard vs. Local Lodge, 1040, 480 F.2d 35 (9th Cir. 1973). Nevertheless the trial court is vested with discretion to waive the exhaustion requirement where plaintiff can establish that exhaustion would be either futile or inadequate.

4. Article 33 of the Constitution of the International Union embodies the above-mentioned public policy and imposes it on members of the International Union. The procedures contained in Article 33 of the Constitution are incorporated in the By-Laws

of Local 509. Article 33, Section 12 of the International Constitution requires invocation of the internal union appeal procedures before a member resorts to a civil court or governmental agency for redress.

5. The intra-union remedies provided in Articles 32 and 33 of the Constitution of the International Union and the By-Laws of Local 509 provide an objective forum and tribunal for the redress of Plaintiff's grievance against the International Union and Local 509. Consequently, the intra-union remedies provided by the International Union and Local 509 are, as a matter of law, adequate. Newgent vs. Modine Mfg., 495 F.2d 919 (7th Cir. 1974); Brookins vs. Chrysler, 381 F.

Supp. 563 (E.D. Mich. 1974); Jenkins vs. General Motors, 364 F. Supp. 302 (DC Del. 1973); 76 Harvard Law Review 983, 1035 (March, 1973).

6. The Public Review Board lacked the power to restore Plaintiff to his job. However, such power is not necessarily required for an adequate remedy. The powers of the Public Review Board are functionally adequate within the requirements of the instant case.

7. Exhaustion of the intra-union remedies provided by the International Union and Local 509 would not have been futile for the plaintiff because there was not a preordained negative result.[1]

8. Because Plaintiff has failed to initiate, let alone exhaust, the intra-union remedies provided by the International Union and Local 509, the parties have agreed and the Court finds that the issue of the Union's breach of its duty of fair representation and the issue of whether just cause existed for Plaintiff's discharge by the employer are both rendered moot and must be dismissed. Plaintiff's failure to exhaust the intra-union remedies bars him from proceeding further in this action. Buzzard vs. Local 1040, supra, Newgent vs. Modine Mfg. Co., supra. Accordingly, judgment must entered in favor of Defendants including the award of costs of suit.

DATED: May 27, 1977

/s/ Irving Hill
UNITED STATES DISTRICT JUDGE

[1]The above Findings and Conclusions are not affected by any concept of burden of proof. Assuming arguendo that Defendants have the burden of proof to show the Plaintiff's failure to exhaust intra-union remedies, the adequacy of those remedies and the lack of futility of exhausting such remedies, the Defendants have met such a burden by the preponderance of evidence.

Nos. 80-54 and 80-5049

IN THE

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October Term, 1980

ITT GILFILLAN, a Division of International Telephone and Telegraph Corporation, a corporation,

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vs.

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Respondent.

CLIFFORD E. CLAYTON,

Petitioner,

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL NO. 509,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER ITT GILFILLAN.

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QUESTIONS PRESENTED FOR REVIEW.

1. Does an employee's failure to exhaust internal union remedies, which were found to be adequate by the district court, bar his action against the company as well as the union?

2. Is the union a necessary and indispensable party for an employee to prove that the union breached its duty of fair representation?

3. May an employee who knowingly chooses not to exhaust internal union procedures, proceed solely against the company and require the company to present the union's defense to the alleged breach of the duty of fair representation?

4. May internal union remedies be deemed adequate to bar an action against the union because of an employee's failure to exhaust those remedies, but be deemed inadequate to bar an action against the company because they cannot provide reinstatement of the grievance?

5. Does the fact that the internal union remedies only provide monetary damages and do not provide for reinstatement make those remedies "inadequate" as a defense?

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Respondents.

BRIEF FOR PETITIONER ITT GILFILLAN.

Statement of the Case.[1]

This case arises from the discharge of Clifford E. Clayton ("Clayton") by his employer, ITT Gilfillan[2] ("Company") on February 14, 1975. Clayton was a member of and represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 509 (jointly referred to herein as "Union" or "UAW") which had a collective bargaining agreement ("Agreement") with the Company. That Agreement contained a mandatory grievance and arbitration procedure and within the time limits allowed by the Agreement, the Union filed a grievance on Clayton's behalf contesting the discharge. After a thorough investigation of the discharge, the

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[1]Although ITT Gilfillan is a petitioner and was entitled to file an opening brief, the parties, with the concurrence of the Clerk of the Court, agreed that since Clayton had to address positions taken by ITT Gilfillan and the UAW it would be more logical for Clayton to file the opening brief and for ITT Gilfillan and the UAW to file responding briefs. Thus this brief is filed in accordance with the Court's rules governing respondent's briefs.

[2]ITT Gilfillan is a division of International Telephone and Telegraph Corporation. That corporation has the following subsidiaries (not wholly owned) and affiliates:

ITT Consumer Services Corporation
ITT World Directories Inc.
Bell Telephone Manufacturing Company
Compagnie Generale de Constructions Telephoniques
Compania Standard Electrica Argentina
Standard Electrica S.A.
Standard Elektrik Lorenz A.G.
Standard Telefon OG Kabelfabrik A/S
Standard Telephones and Cables Pty. Limited
Grohe Handels G.m.b.H.
I.A.O. Industries Riunite Spa
H.W. Liebrich G.m.b.H.
Hartford Fire Insurance Company
Transatlantische Ruckversicherungs AG

Omitted from the list are the names of other subsidiaries since, if considered in the aggregate as a single subsidiary, they would not constitute a significant subsidiary.

pursuit of the grievance through the third step of the grievance procedure, and a timely request for arbitration, the Union withdrew the grievance. (J.A. 22).[3]

Clayton, a Union shop steward,[4] did not attempt to invoke the internal union remedies available to challenge the Union's refusal to pursue his grievance. (J.A. 23). Instead, he filed a lawsuit in federal district court, (J.A. 3), alleging that the Union breached its duty of fair representation and that his discharge was in breach of the Agreement (*i.e.*, the Company did not have "just cause" for his discharge). (J.A. 4, para. 7). The Company and the Union denied that either the Agreement or the duty of fair representation had been breached. The Union and the Company raised as an affirmative defense, the failure of Clayton to exhaust internal union remedies. (J.A. 12, para. 15; and J.A. 18, para. 15).

The internal procedures of the UAW for reviewing and remedying the actions of Union officials are extensive and complete. They are designed to offer opportunities for the just disposition of legitimate complaints at various points in the process. These procedures provide for the prompt consideration and processing of complaints and allow a complaining member or his counsel the right to fully present his case. (J.A. 83-88, Jt. Ex. E, R.T. 25). Within thirty days of an alleged improper action a Union member has the right to appeal that action to the Amalgamated Local Union. Action by the Amlgamated Local Union on the complaint must occur within forty-five days of the initiation of proceedings by the member. Thirty days after the Amalgamated

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[3]The following abbreviations are used herein in citations to the record: Joint Appendix (J.A.), Reporter's Transcript (R.T.), Record on Appeal (R.); number references are to page.

[4]Clayton held this position from 1967 until he was terminated. (R.T. 139-140).

Local Union acts or if it does not take any action, after the forty-five day period has expired, the member is entitled to appeal to the International Executive Board. This is accomplished by filing an appeal with the International President. Within sixty days after the receipt of the appeal by the President, the International Executive Board must use its best efforts to render a decision. It should be noted that this process can be expedited in appropriate cases with the President deciding an appeal without submitting the issue to that Board. If a decision is made at this level which leaves the member unsatisfied, within thirty days, he may appeal to the Constitutional Convention Appeals Committee ("CAC") or to the Public Review Board ("PRB"). The Union Constitution mandates the exhaustion of these procedures before the institution of judicial proceedings. (J.A. 69-77, Jt. Ex. B, R.T. 24).

Although the UAW Constitution does not explicitly address the remedies that the CAC or PRB can order, it grants each of them broad general powers. The CAC has ". . . the authority to consider and decide all appeals submitted to it" and "(a)ll decisions of the Committee are to be final and binding." (J.A. 73-74). The PRB has the power to ". . . make final and binding decisions on all cases appealed to it . . ." and to ". . . dispose of all facets of the appeal." (J.A. 64-65, 76). In practice, these grants of power have resulted in a broad range of remedies to aggrieved members. The PRB has awarded money damages for union misconduct and has ordered the Union to refile a grievance not properly submitted to arbitration by the Union. (J.A. 96, Jt. Ex. F-1, R.T. 26; J.A. 103, Jt. Ex. F-2, R.T. 26).

The federal district court ordered the trial of this case divided into three parts. The first considered the effect of Clayton's failure to use the internal union remedies reviewed above.

After that phase of the trial, the district court found that: (1) Clayton had failed to exhaust his internal union remedies; (2) those remedies were an appropriate and adequate means of redressing his grievance in that the PRB had the power to grant a range of possible relief including an award of money damages; (3) that Clayton was fully aware of the UAW internal union remedies; and, (4) that pursuit of those remedies would not be futile and therefore Clayton's failure to exhaust them could not be excused. The Court held as a matter of law that Clayton could not maintain his suit against the Union or the Company. (Appendix to Pet. for Cert.: Findings of Fact and Conclusions of Law, 1-11).

On appeal the Ninth Circuit Court of Appeals affirmed the judgment in favor of the Union. However, it reversed the judgment in favor of the Company.

Summary of Argument.

National labor policy has been expressed by the courts to favor the reliance on extrajudicial forums for the resolution of industrial disputes arising out of collective bargaining agreements or their administration. Judicial action is to be stayed pending the consideration of issues being processed through arbitration or internal union procedures.

In order to further this policy, rules of law must ensure the continued strength and vitality of incentives for employees to proceed to arbitration with their grievances and to exhaust internal union remedies. Increased reliance upon judges and juries for adjudication of workplace disputes will not result in greater justice and may substantially interfere with the collective bargaining relationship between employers and unions. Because of their intimate familarity with the law and customs of the shop, arbitrators have been recognized as possessing a special ability in the resolution of industrial disputes. Similarly, internal union procedures have a special capacity for reviewing actions by union representatives, and may lead to the private resolution of conflicts which would otherwise have to be resolved by the courts. Decreased reliance on these private dispute resolution mechanisms will result in an increasing burden on the federal court system which is not as well equipped to handle these disputes as the procedures of arbitration and internal union remedies.

The failure of an employee to exhaust internal union procedures should be a defense both for the union and the employer. It is a fundamental principle of labor law that the establishment of the breach of the union's duty is a condition precedent to establishing that the employer may have breached the collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). Numerous courts have

also held that a failure of an employee to exhaust adequate internal union remedies is a defense for the union. *See, e.g., Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 104 (3rd Cir. 1968), cert. denied, 393 U.S. 1048 (1969). In order to further implement the national policy to encourage the private resolution of employer-union-employee disputes, the Court should conclude that employees must exhaust internal union procedures before instituting suit against the union or the employer. By providing that their failure to do so bars their court action, employees will be encouraged to use private dispute resolution procedures. Consequently, the use of internal union remedies has the potential to substantially reduce the number of the duty of fair representation cases in the federal court system.

As a matter of fundamental fairness, there are several factors that dictate that the employer be entitled to rely on the employee's failure to exhaust internal union remedies. The duty of fair representation is the union's obligation, not the employer's. If the union is not a party to the determination of that issue, the employee will prevail upon establishing, prima facie evidence of a breach, unless the employer assumes the burden of defending the actions of the union. The evidence necessary to establish such a defense is usually completely within the union's possession. Thus the employer is not in the best position to defend against the employee's claim. In order to prevent a finding that the union breached its duty, the employer must engage in the complete discovery of internal union documents and evidence bearing on the issue. However, since the union is no longer a party or liable upon a finding of a breach of the duty, it will have little incentive to assist the employer in presenting this defense.

Another factor pointing to the union's indispensability is the fact that the union has a continuing responsibility to

interpret and administer the collective bargaining agreement. The union has a vital interest in the interpretation of the collective bargaining agreement since it has the duty to administer it with respect to other bargaining unit members. The district court cannot fully understand and appreciate the union's position and the impact of the court's interpretation of the collective bargaining agreement upon the bargaining unit unless the union is a party to the litigation. In order to ensure an interpretation of the agreement consistent with the union's role in its day-to-day administration, the union must be a party. To hold otherwise would be to compromise the union's interest in protecting the other union members in the bargaining unit.

Although an employee may be excused from exhausting internal union procedures where they would result in an inadequate remedy or their pursuit would be futile, this is not such a case. It is well recognized that the UAW procedure is an exemplary model of an adequate union remedy. This procedure can result in the award of money damages or an order for the union to resubmit an employee's complaint to the contractual grievance and arbitration process. Section 101(a)(4) of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") (29 U.S.C. §411(a)(4)) provides that an employee can be required to invoke an intraunion remedy for a four month period. The UAW process is designed so that not only will an initial decision be made within the four month period, but with the possibility of a final decision being issued within that period. For this reason, an employee cannot claim that the remedy is inadequate.

It is the Company's position that the Union's internal remedies are adequate and that the Company as well as the Union is entitled to rely on Clayton's failure to exhaust those remedies. The national labor policy in favor of the

private resolution of labor disputes fully justifies this finding, even though the union remedy cannot guarantee the reactivation of the grievance procedure or the reinstatement of Clayton.

An alternative position taken by the Company is that because of national labor relations policy, Clayton's exhaustion of his internal union remedies could have resulted in the reactivation of his grievance and the arbitration of the underlying dispute. Employers and unions are deemed to be aware of the strong national policy in favor of arbitration and the private resolution of labor conflicts when they negotiate collective bargaining agreements. Based upon the theory adopted by the Court in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243, 255 (1977), it may be concluded that national labor policy requires the employer to reinstate an employee's grievance upon a finding that the union breached its duty of fair representation. The internal union remedies are impliedly incorporated into the grievance and arbitration process. Consequently, an employer can rely on the non-exhaustion of the procedure and, so long as the collective bargaining agreement does not expressly prohibit the reinstatement of the grievance, a finding of the breach of duty can result in the reinstatement of the grievance.

If the Court does not accept any of the foregoing theories, then it should remand the Company and the Union to district court for trial of the breach of the duty of fair representation issue. An affirmation of the decision by the Ninth Circuit would place an unfair burden on the Company to defend the Union's action. Additionally, relieving the employee of any responsibility to exhaust internal union procedures and excusing the union from any liability, substantially interferes with the union's statutory right to be the exclusive representative of the collective bargaining unit. The employee may circumvent the union's good faith refusal to

take a matter to arbitration. Without the Union as a party he may establish a breach by showing prima facie evidence of it, and thereby obtain a hearing on the underlying grievance. In addition, the Ninth Circuit decision leaves the possibility of collusive action between the employee and the union. The Union may find it politically imperative to support the employee's claim. Furthermore, the policy established in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), supports a conclusion that a breach of the duty of fair representation cause of action can never be barred by the failure to exhaust internal union remedies since such a claim does not solely involve "the internal affairs of the Union. . . ." 391 U.S. at 427, n. 8.

The following, in order of the Company's preference, is a summary of three possible dispositions the Court could make in this case:

First, the Court may decide that the Company is entitled to rely on the plaintiff's failure to exhaust internal union remedies. This would preserve those remedies and strengthen their function as an integral part of national labor policy. The Argument in parts I and II sets forth the reasons supporting such a decision.

Second, the Court could conclude that since all collective bargaining agreements have been negotiated in light of the national policy to promote collective bargaining and to foster private settlement of labor disputes (both by means of internal union procedures and independent arbitration), if a union is found to have breached its duty of fair representation, the underlying contract dispute must be decided by arbitration under the collective bargaining agreement, unless that agreement specifically provides otherwise. The time limits in the collective bargaining agreement within which

a grievance must be processed, would be suspended during the processing of the breach of fair representation claim. If in fact a breach were found, the grievance would be reactivated and the parties would return to arbitration, the bargained for method of resolving collective bargaining disputes. This result would be consistent with national labor relations policy and relieve the federal courts of a significant number of cases alleging a breach of the duty of fair representation pending in the federal courts. Failure of an employee to exhaust his internal union remedies would constitute a complete bar to any action against his union or employer. This alternative is reviewed in part III of the Argument.

Third, the Court could find that employees do not have any obligation, under any circumstances, to exhaust internal union remedies in a duty of fair representation case and remand the Company and the Union to district court for trial. This alternative is reviewed in Part IV of the Argument. Under this result, the Union would be a party in the determination of the breach of its duty of fair representation. However, unless the Court ordered the case to be referred to an arbitrator in the event a breach of the duty was found, the lower court or a jury could decide the underlying breach of contract issue. The adverse effect of such a fact finder upon national labor policy, with its stated preference for the use of arbitrators to decide collective bargaining agreement disputes, would be incalculable.

ARGUMENT.

INTRODUCTION.

This case presents the Court with an opportunity to issue a decision to clarify national labor relations policy with respect to the use of internal union remedies prior to the institution of a lawsuit alleging a breach of the duty of fair representation. This case also provides a vehicle for the Court to reaffirm the use of arbitration for the determination of the underlying contract dispute in the event there is a conclusion that the union breached its duty of fair representation.

In reviewing the issues presented in this case, the national labor policy of the Steelworkers Trilogy[5] and innumerable subsequent cases, must be maintained in focus. That policy requires the arbitration of all disputes arising under a collective bargaining agreement containing an arbitration clause ". . . unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[6] The Court also stated that "[d]oubts should be resolved in favor of coverage."[7]

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[5]*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[6]*United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. at 582-583.

[7]*Id.*, at 583.

Since the Steelworkers Trilogy decisions in 1960 there have been thousands of arbitration awards[8] interpreting and applying collective bargaining agreements. An experienced core of labor arbitrators has developed over the years.[9] Only a small number of these awards are ever challenged in court.[10] Because of the strong national labor policy for the arbitration of disputes over the interpretations and application of collective bargaining agreements, the courts have been relieved of innumerable cases which they would otherwise be called upon to decide.

However, cases involving an alleged breach of the duty of fair representation threaten that national policy and pose the possibility that they will result in a substantial increase

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[8]Volume 35 of Labor Arbitration Reports, published by Bureau of National Affairs, contains arbitration awards published commencing in September 1960. Current arbitration awards are being published in Volume 75 of Labor Arbitration Reports. Each volume reports several hundred labor arbitration awards. These 40 volumes report substantially in excess of 10,000 awards. Commerce Clearing House, an independent reporter of arbitration awards, publishes Labor Arbitration Awards. There is little duplication of the awards published by each company. Since 1960 there have been 40 volumes of Labor Arbitration Awards. In those volumes more than 10,000 arbitration awards have been published. These reported arbitration awards represent only a small percentage of all cases arbitrated. Most awards are not published.

The American Arbitration Association (AAA) reports that 16,669 cases were referred by that organization to labor arbitrators in 1979 and that 7094 arbitration awards were submitted by arbitrators to AAA that year. The Federal Mediation and Conciliation Service (FMCS) reports that during the year October 1979 through September 1980 it received requests for 33,327 arbitration panels and that 8405 arbitration awards were submitted to it. The AAA and FMCS are independent organizations.

[9]FMCS lists more than 1300 labor arbitrators and AAA lists approximately 3000 labor arbitrators.

[10]"The relatively small number of reported cases contesting the countless arbitration proceedings convened to resolve labor-management disputes attests to the parties' general satisfaction with this method of resolving industrial problems." *Piggly-Wiggly, Etc. v. Piggly-Wiggly, Etc.*, 611 F.2d 580 at 581 (5th Cir. 1980).

in the burden that is placed upon the federal judicial system. The requirement that employees exhaust internal union remedies allows the union to police its administration of collective bargaining agreements. In order to encourage the use of that procedure, any employee who fails to use it must be completely barred from any further litigation against the union or the company. This case presents an opportunity for the Court to reaffirm the role of the internal union remedy and the use of arbitration to resolve the underlying dispute.

In contrast to the national labor policy favoring arbitration, a number of courts in the federal judicial system, after concluding that a breach of the duty of fair representation occurred, have either decided the breach of contract issue or submitted it to the jury for its decision.[11] The interpretation of collective bargaining agreements is not one of the normal functions of courts. In fact because of the Steelworkers Trilogy and subsequent decisions, courts have not normally been called upon to interpret collective bargaining agreements. The words of Justice Douglas in *United Steelworkers v. Warrior & Gulf Navigation Corp.*, 363 U.S. 574 at 581-582 (1960), are more appropriate today than when written 20 years ago:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . .
>
> The labor arbitrator's source of law is not confined to express provisions of the contract, as the industrial common law—the practices of the industry and the

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[11] *See e.g., Kirkland v. Arkansas-Best Freight System, Inc.*, 629 F.2d 538, 540 (8th Cir. 1980); *Alvey v. General Elec. Co.*, 622 F.2d 1279, 1282 (7th Cir. 1980); *Pitts v. Frito-Lay, Inc.*, 105 LRRM 3223, 3224 (E.D. Mich. 1980); *Atwood v. Pacific Maritime Ass'n.*, 432 F.Supp. 491, 497 (D. Ore. 1977).

> shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in this knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

As was recognized in the Steelworkers Trilogy, the parties to a collective bargaining agreement have bargained for the resolution of conflicts concerning the collective bargaining agreement by the use of arbitrators. Those arbitrators have developed an expertise with respect to the "common law of the shop." The parties to a collective bargaining agreement, and the employer in particular, did not bargain for a court or a jury to sit in judgment on their actions. Employers and unions have established a confidence in the ability of arbitrators to decide questions involving the collective bargaining agreement. That confidence does not exist with a judge or jury. Juries especially may be influenced by factors which an arbitrator who possesses knowledge of the "common law of the shop" may find to be of no sig-

nificance. By the very fact that juries constantly change, it would be impossible for them to obtain the underlying knowledge which is necessary for an arbitrator to properly decide a collective agreement question.

In light of this background, the breach of the duty of fair representation concept must be carefully reviewed and placed in its proper perspective. It is imperative that this concept be harmonized with the national labor policy established in the Steelworkers Trilogy.

I.

THE FAILURE TO EXHAUST INTERNAL UNION PROCEDURES IS A DEFENSE FOR THE UNION AND THE EMPLOYER.

A. The Employer Is Seriously Prejudiced by the Ninth Circuit Decision.

In a breach of the duty of fair representation and breach of contract lawsuit, the employer is only secondarily liable. The plaintiff must first prove that a breach of the union's duty has occurred. In any such proceeding the union is a necessary, if not indispensable,[12] party to a finding that it breached its duty of fair representation. If the plaintiff is allowed to sue his employer even though the union has been dismissed because the plaintiff has failed to exhaust internal union remedies, the employer would be placed in the untenable position of attempting to litigate an issue wherein, as in this case, the union was the sole party involved. Although the employer obviously has an "interest" in a determination that a breach of the duty did not occur, it is not in the best position to defend against that charge. As in the instant case, the Company was not involved in the decision to abandon the plaintiff's grievance. That decision, as is

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[12]See Argument II, *infra* p. 27.

normal in the Union-Company grievance procedure, was made by the Union after its internal investigation, without consultation with the Company. The Union and the Company are adversaries who do not confide in each other as to their internal deliberations and decisions with respect to the processing of grievances.

Thus, the Ninth Circuit decision in this case places a difficult, if not impossible, burden on the Company with respect to the breach of the duty of fair representation issue. Under that decision, if any defense is presented to the claim that the Union breached its duty of fair representation, it must be presented by the Company. Unless the Company presents this defense, the plaintiff will prevail upon a prima facie showing of a breach. Why should the plaintiff, who has failed to exhaust his internal union remedies and thus relieved the Union of not only potential liability for its breach, but relieved the Union of its responsibility to present a defense, be entitled to benefit by this act? Even if the Company chooses to present a defense to the breach of the duty issue, it is not in a position to present the case to the same complete extent the Union could. The Company would have to depose the Union witnesses and subpoena Union documents in an attempt to present its position.[13] It should be clear that the Union and its witnesses may have little incentive to fully and openly cooperate with the Company in the presentation of this defense. In fact, the Union is the traditional adversary of the Company and this may affect

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[13]The Federal Rules of Civil Procedure ("F.R.C.P.") provide definite limits on the ability of a party to engage in discovery with a non-party. F.R.C.P. Rule 33 provides that interrogatories may be directed only to parties. Before a non-party can be required to produce documents, "good cause" must be shown for a subpoena duces tecum. F.R.C.P. Rule 30(b)(1). Under F.R.C.P. Rule 34, neither a subpoena duces tecum nor good cause is required to compel a party to produce documents.

the degree of cooperation from union witnesses. In addition, the Union no longer has any monetary liability to the plaintiff even if a breach of the Union's duty is established. Finally, the plaintiff is still a Union member and it may be in the Union's own self-interest to assist the plaintiff's claim against the Company.

Furthermore, the Ninth Circuit decision allows the employee the opportunity to circumvent a union's good faith decision not to pursue a grievance. There is also the possibility that the Union will collude with the employee in order to circumvent the arbitration process, and bring the issue before a jury.

Thus to allow the union and not the employer to use the defense of the failure to exhaust internal union procedures raises possibilities which would destroy a major benefit to be gained from the private resolution of labor disputes.

It is upon this background that the Court must conclude that both the union and the employer are protected by the employee's failure to exhaust internal union remedies.

B. Existing Law.

There are a number of cases which hold that the failure to exhaust internal union remedies is a defense for the employer as well as the union:

Rainey v. Missouri Utilities Co., 596 F.2d 310 (8th Cir. 1979); *Willetts v. Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978); *Dezura v. Firestone Tire & Rubber Company*, 470 F.Supp. 121 (E.D. Pa. 1979), aff'd. mem. 612 F.2d 571 (3rd Cir. 1979); *Aldridge v. Ludwig-Honold Manufacturing Co.*, 385 F.Supp. 695 (E.D. Pa. 1974), aff'd. mem. 517 F.2d 1397 (3rd Cir. 1975), cert. denied, 423 U.S. 937 (1975); *Rehm v. Quaker Oats Co.*, 478 F.Supp. 619 (M.D. Pa. 1979); *Sherba v. Teamsters Local 400*, 101 LRRM 2582 (N.D. Ohio 1979); *Neiger v. Sheet Metal Workers Int'l.*,

470 F.Supp. 622 (W.D. Mo. 1979); *Kobielnik v. International Brotherhood of Teamsters, Etc.*, 470 F.Supp. 125 (E.D. Pa. 1979); *Provencal v. Allegheny Airlines, Inc.*, 383 F.Supp. 159 (D.R.I. 1974).

The reasons for these decisions may be categorized as follows:

1) The policy of the extrajudicial resolution of disputes, especially where a union is involved, requires that an employer be able to rely on the nonexhaustion of internal union remedies as a defense.

2) The exhaustion of internal union remedies is an established condition precedent to deciding the issue of a breach of the duty of fair representation.

3) Fair and adequate internal union procedures can result in an adequate remedy for an aggrieved employee and they should be given a full opportunity to function.

There are also a number of cases which hold that an employer is not entitled to raise this defense:

Geddes v. Chrysler Corp., 608 F.2d 261 (6th Cir. 1979); *Fizer v. Safeway Stores, Inc.*, 586 F.2d 182 (10th Cir. 1978); *Winter v. Local Union No. 639, Etc.*, 569 F.2d 146 (D.C. Cir. 1977); *Peterson v. Rath Packing Company*, 461 F.2d 312 (8th Cir. 1972); *Anderson Grocers Supply Co., Inc.*, 483 F.Supp. 73 (S.D. Tex. 1979); *Miller v. Local 50, Am. Fed. of Grain Millers*, 468 F.Supp. 193 (D.Neb. 1979).

The reason for these decisions may be summarized as follows:

1) The union constitution, from which internal union remedies arise, is a contract between the union and its members and therefore because the company is not a party to that contract it may not rely on it.

2) Allowing the employer the right to rely on an employee's failure to exhaust intraunion remedies will not

further the judicial policy underlying restraint in interfering in intraunion affairs.

There are also a number of cases which hold that the employer cannot rely on the exhaustion defense unless the underlying grievance can be reinstated as a result of the use of internal union remedies.

Murray v. Branch Motor Express Co., ... F.2d .... (4th Cir. 1980); *Tinsley v. United Parcel Service Inc.*, ... F.2d .... (7th Cir. 1980); *Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir. 1980); *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315 (10th Cir. 1980); *Harrison v. Chrysler Corp.*, 558 F.2d 1273 (7th Cir. 1977); *Orphan v. Furnco Constr. Corp.*, 466 F.2d 795 (7th Cir. 1972); *Gerb v. Boeing Company*, 102 LRRM 2854 (E.D. Pa. 1979); *Neipert v. Arthur G. McKee & Co.*, 448 F.Supp. 206 (E.D. Pa. 1978); *Pawlak v. International Broth. of Teamsters, Etc.*, 444 F.Supp. 807 (M.D. Pa. 1977), aff'd mem. 571 F.2d 572 (3rd Cir. 1978).

C. National Labor Relations Policy Requires the Exhaustion of Internal Union Remedies.

The duty of fair representation is a judicially created concept arising out of *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1954); *Humphrey v. Moore*, 375 U.S. 335 (1964); and *Vaca v. Sipes*, 386 U.S. 171 (1967). That doctrine requires a union to fairly and equitably represent all of its members and is derivative of its right to exclusively represent its members. This doctrine is used to allow an employee the right to receive a hearing on a contractual grievance if the union has breached its duty and the employee would otherwise be foreclosed from a hearing. The doctrine was created with a view towards protecting the employee from arbitrary action by the union in refusing to pursue a grievance. It is only after the employee proves the condition

precedent of the union's breach of its duty that he may pursue the employer.

> "For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, *provided* the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca v. Sipes*, 386 U.S. 171 at 186 (1967). (Emphasis added.)

Courts have been careful not to unduly intrude upon the union's duty and responsibility toward its members without allowing the union to review its own action. Thus the concept of exhaustion of internal union remedies was judicially introduced as a defense to the breach of the duty of fair representation action.

> "It has been the general rule, and the rule of this circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so. There is good reason for this rule which forestalls judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own legitimate affairs." *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87 at 104 (3rd Cir. 1968), cert. denied, 393 U.S. 1048 (1969).[14]

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[14]*See, e.g., Tinsley v. United Parcel Service, Inc.*, ... F.2d .... (7th Cir. 1980); *Murray v. Branch Motor Express Co.*, ... F.2d .... (4th Cir. 1980); *Clayton v. ITT Gilfillan*, 623 F.2d 563 (9th Cir. 1980); *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315 (10th Cir. 1980); *Rainey v. Missouri Utilities Co.*, 596 F.2d 310 (8th Cir. 1979); *Willetts v. Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978); *Winter v. Local Union No. 639, Etc.*, 569 F.2d 146 (D.C. Cir. 1977); *Dezura v. Firestone Tire & Rubber Company*, 470 F.Supp. 121, aff'd mem. 612 F.2d 571 (3rd Cir. 1979).

This defense must be available to the employer as well as the union in order to ensure that the objectives of national labor relations policy are achieved. The entire system of labor relations policy in the United States is built upon the use of private dispute resolution procedures. As fully recognized with respect to arbitration decisions, these private procedures are beneficial to the employer, the union, the employee, and the public at large. Arbitrations are a speedy and economical procedure which relieve the court system of innumerable cases.

Internal union procedures serve the same function with respect to an alleged breach of the duty of fair representation. Internal union appellate bodies are given an opportunity to review the acts of their locals. That review provides the union with an opportunity to govern its own organization. The time spent in such a review would be substantially shorter than that required in seeking court review. Therefore, the burden imposed on the employee is not significant, especially in light of the four month period in §101(a)(4) of the LMRDA. In contrast to this slight burden on employees, there is the benefit gained by providing the union the opportunity to resolve the claim before it reaches court. The resulting decrease in the burden on the federal court system is beneficial to society as a whole.

To adopt the decision of the Ninth Circuit would be to substantially impair the collective bargaining process and the value of the policy of requiring employees to exhaust internal union procedures. If the union decides in good faith that a grievance should not be taken to arbitration, the aggrieved employee would decide to sue only the employer. He would knowingly not choose to exhaust internal union procedures. Since the union cannot be made a defendant because the employee has failed to exhaust his internal union remedies, the employer, if anyone, must attempt to defend

the union's action. However, the employer is not in a position to present a defense as strong as the union could present. Further, at this stage of the proceeding, the union has no incentive to assist the employer. Because of these facts, the employee may prevail on a prima facie showing and be entitled to a judicial or arbitral review of the underlying contract dispute, in spite of the union's good faith decision not to arbitrate the grievance. This is obviously not in accord with national labor policy. The employee has usurped the union's statutorily mandated "exclusive" right to represent bargaining unit employees. Labor Management Relations Act of 1947 ("LMRA") Section 9(a), 29 U.S.C. § 159(a). In order to prevent this emasculation of the statutory mandate, both the employer and the union must be entitled to use the employee's failure to exhaust internal union remedies as a defense.

Such a conclusion also comports with general principles of law where liability is dependent on first establishing the liability of another. As established by cases where proof of a breach of a legal duty by one party must be made before attempting to show a breach of a duty by another party, if the plaintiff is unable to establish the first party's breach, he can proceed no further.[15] This principle is illustrated by cases where an injured plaintiff must first obtain a judgment against that tortfeasor before he may seek recovery from the insurance company of the tortfeasor. A failure in proof as to the tortfeasor is a failure as to the insurer.[16]

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[15]"And, when sued jointly with the servant, a judgment against the master alone, based upon respondeat superior, cannot stand." *Seaboard Airline R. Co. v. Coastal Distrib. Co.*, 273 F.Supp. 340 at 343 (D.S.C. 1967). *Accord, Jentick v. Pacific Gas & Electric Co.*, 18 Cal.2d 117, 114 P.2d 343 (1941).

[16]*Accord, e.g. Fagnon v. Great Central Ins. Co.*, 577 F.2d 418, 420 (7th Cir. 1978).

"Such liability cannot be established where the injured parties have waived their claims against the alleged wrongdoer." *Anderson v. McNally,* 150 Cal.App.2d 778 at 781, 310 P.2d 975 (1957).

It follows that it is also a prerequisite to an employee's case against his employer, that he first prove in an action against the union that the duty of fair representation was breached. Once the union is dismissed from the case, whether it be from an adjudication that no breach occured or because the employee did not pursue internal union procedures, the employee should be judicially foreclosed from establishing a breach of the duty.

D. Plaintiff's Internal Union Remedies Were Adequate to Afford Him Relief.

It is only when the pursuit of internal union procedures would result in an inadequate remedy or their pursuit would be futile that an employee should be excused from exhausting them.

The exhaustion of the UAW internal union remedies would have afforded Clayton an adequate remedy. As has been noted by many courts, the UAW procedure is a superior example of an effective intraunion means of providing relief for aggrieved union members. *See, e.g., Battle v. Clark Equip. Co.,* 579 F.2d 1338 (7th Cir. 1978); *Fleming v. Chrysler Corp.,* 416 F.Supp. 1258 (E.D. Mich. 1975), aff'd. 575 F.2d 1187 (6th Cir. 1978). This procedure is structured so that final relief from the PRB is possible within the four month period specified under Section 101(a)(4) of the LMRDA. Under the UAW procedure, action by a local union on a complaint must be taken within forty-five days after the initiation of the intraunion procedure. Within thirty days thereafter, the employee can appeal to the International Executive Board ("IEB") which is to use its best efforts

in rendering a decision within sixty days. If the President of the Union has not expedited the process, an appeal, after this maximum 115 day period, may be taken to the PRB which is the final step in the appeal process. (J.A. 69-77). Although there is no guarantee that a final decision will be rendered within the four month period, it is specifically provided that an initial determination on the claim will be made within forty-five days by the local union and that this decision will be reviewed by the IEB within ninety days. In *Jenkins v. General Motors Corporation,* 364 F.Supp. 302 at 308 (D.Del. 1973), the court stated that a union procedure need only hold out a "realistic possibility" that an initial decision be rendered within the four month period and held that the UAW procedure satisfied this requirement. *Accord, Harris v. International Longshoremen's Asso., Local 1291,* 321 F.2d 801, 805-806 (3rd Cir. 1963).

The Ninth Circuit was in error in assuming reinstatement to be the only adequate remedy in a case involving the discharge of an employee. The district court was correct in its analysis of the issue. It found that the Union could grant money damages for a breach of the Union's duty. Because this award could compensate both for lost wages and prospective injury it was held that this was an adequate remedy to an aggrieved plaintiff. This result is in accord with a substantial body of law which holds that prospective monetary damages cannot be rejected as an alternative to reinstatement merely because they may be difficult to quantify. *See, Thompson v. Brotherhood of Sleeping Car Porters,* 367 F.2d 489, 493 (4th Cir. 1966), *citing, John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964) and *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1956). Further, other courts have stated that prospective monetary damages may be the remedy of choice in situations where, such as here, there is a lengthy delay between the

award of the remedy and the event upon which it is based.[17] This recognizes the substantial changes that occur with the passage of time both as to the employee and as to the employing organization. The employee may not be able to perform his old job because of technological changes since the content of work continues to change as new products and procedures are developed. In fact an employee's job may no longer exist.

> "Reinstatement still may not be the appropriate form of prospective relief in this case, however, for it may be that the six year delay since discharge has made reinstatement impractical. . . . If such impracticality exists, we can see no reason why an award for future lost earnings would not be in order. . . ." *De Arroyo v. Sindicato de Trabajadores Packing., AFL-CIO*, 425 F.2d 281 at 292 (1st Cir. 1970).

Because of the adequacy of the remedy to plaintiff and the policies discussed above, the Company should be entitled to rely on the employee's failure to exhaust his internal union remedies.

II.

THE UNION IS AN INDISPENSABLE PARTY.

A. Factors Upon Which Indispensability Should Be Determined.

In an action such as the plaintiff has brought here, the Union is an indispensable party. A court may not proceed to make a determination on the breach of the duty of fair representation without the Union being present. F.R.C.P., Rule 19. Since the Court of Appeals has dismissed the Union from this case, the remaining portion of the case against the

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[17]Clayton was discharged on February 14, 1975.

Company must also be dismissed because of the impossibility of joining an indispensable party.

Although the employer is not a necessary party to an action by an employee against his union for breach of the duty of fair representation (*Kaiser v. Local No. 83*, 577 F.2d 642 (9th Cir. 1978)), the same is not true when an employee attempts to sue his employer for breach of the collective bargaining agreement. The plaintiff may not sue his employer in such a case unless he can first establish that the union has breached its duty of fair representation under the standard set forth in *Vaca v. Sipes*, and subsequent cases. Proof of the breach of the duty of fair representation is a threshold finding that must be made before the court can consider the issue of whether or not the collective bargaining agreement was breached. Such a finding may be made in a separate civil suit against the union, prior to the suit against the employer, or it may be made in the same action where the employer is a defendant, so long as such a finding is made before there is a determination of the breach of contract issue. In determining whether or not a breach of the duty of fair representation occurred, the union is not only a necessary party, but an indispensable party.

In reaching a decision of whether a party is indispensable, a court must determine "whether in equity and good conscience the action should proceed among the parties before it." F.R.C.P. Rule 19(b). The first factor to be considered is "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." *Id.* Also important are ways in which the prejudice might be lessened, the adequacy of a judgment rendered in the party's absence, and whether an adequate remedy will be provided to plaintiff if the action is dismissed. *Id.*

B. Failure to Join the Union Would Be Prejudicial to the Company.

It is a matter of fundamental fairness that if the case against the union is dismissed because the plaintiff failed to exhaust his remedies against the union, then the plaintiff's suit must also be dismissed against his employer because the union is no longer a party. As has been recognized by the courts in several instances ". . . it is simply unfair to expect the Employers to litigate and defend the Union against plaintiffs' claim of unfair representation." *Atwood v. Pacific Maritime Ass'n.*, 432 F.Supp. 491 at 495 (D.Ore. 1977); *See, Kinnunen v. American Motors Corporation*, 56 F.R.D. 102 at 103 (E.D. Wis. 1972).

It would be extremely difficult for the Company to prepare for and present a defense to the claim that the Union had breached its duty of fair representation. Because the Company and the Union are traditional adversaries, Union witnesses would be reluctant to testify on behalf of the Company. Since the Union is not a party, some of the usual F.R.C.P. discovery mechanisms are not available.[18] There would not be any financial incentive for the Union to forget this traditional role; if it is no longer a party to the suit, the Union will no longer have any exposure to monetary liability even if the plaintiff establishes a breach of the Union's duty of fair representation.

The anomolous situation the employer would be in if it had to defend the union's actions, as well as its own, was recognized by the Ninth Circuit.

> "Conditioning the employer's use of the internal exhaustion defense on the adequacy of internal union remedies produces an anomaly. Where the employer

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[18]See footnote 13.

> raises the affirmative defense of failure to exhaust the contract's dispute resolution machinery, and where the employee has failed to exhaust internal union procedures, the employer will be required to defend the union's representation of its members. In an action from which the union has been dismissed, ITT, to prevail on its affirmative defense, must defend the UAW's good faith in declining to prosecute Clayton's grievance." Rev. Op. pp. 22-23, 623 F.2d at 570.

Not only would it be anomalous for the Company to defend the Union's actions, but proof of the union's breach is a crucial element of the plaintiff's case. As was stated by this Court in *Vaca v. Sipes*, 386 U.S. at 193 (1967):

> ". . . the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA §301 charging an employer with a breach of contract."

Because of the critical nature of the proof of this issue it is inappropriate to make the determination that the union has not acted in good faith in the absence of the union. *Kinnunen v. American Motors Corporation*, 56 F.R.D. at 103. The union has the best access to any evidence bearing on any alleged breach of its duty of fair representation. The duty of fair representation is the union's, not the employer's. "While the Employers certainly have an interest in this issue and may participate in its trial, they should not be required to assume sole responsibility . . ." for it. *Atwood v. Pacific Maritime Ass'n.*, 432 F.Supp. at 495.

There is another element of fairness that should prevent the dismissal of the Union in this case. The litigation has progressed for a substantial period of time and has reached this Court with the Union as a party. This was important to the court in *Atwood* where it was noted that the defendant

employers had prepared their case relying on the presence of the unions as defendants.

It should also be noted that the Ninth Circuit's decision reflects a degree of naïvete concerning the interest of the Union in assisting the Company should the Union be dismissed as a party. It could well be in the interest of the Union to assist a union member in procuring a judgment against the Company instead of aiding the Company in presenting a defense against a claim that the Union breached its duty. Such collusion and circumvention of the grievance and arbitration procedures of the collective bargaining agreement would not be in the furtherance of justice and should not be encouraged.

C. A Judgment Rendered Without Joinder of the Union May Result in the Misinterpretation of the Agreement for Which the Union Is Statutorily Responsible.

If the Union is found to have breached its duty of fair representation, the contract must be interpreted to determine if the Company was in breach of it. Consequently, the Union must be present "to aid in the Court's interpretaion of the collective bargaining agreement." *Johnson v. Colts, Inc.*, 306 F.Supp. 1076 at 1079 (D. Conn. 1969). This is because "[d]isposition of this action without such unions being present would probably impede their ability to protect their interests in the subject of this litigation; they would not be available to defend the positions they may have taken in administrating the agreement." *Kinnunen v. American Motors Corporation*, 56 F.R.D. at 103.

The necessity of the Union as a party is further highlighted by the relief sought by plaintiff. Reinstatement is a pervasive remedy affecting the relative status of employees in the collective bargaining unit. Because of this and the contin-

uing responsibility of the union and the employer in implementing the contract the union must be made a party to its interpretation.

In *Bradley v. Ford Motor Co.*, 417 F.Supp. 23 at 25 (N.D. Ill. 1975), the court was faced with this situation and stated:

> "The plaintiff seeks reinstatement to his employment and seniority rights, and this remedy would affect the status of other members of the union who are employees of the defendant company. Therefore it seems to us that this case could not proceed without the presence of the union, because the requirements of F.R.C.P. 19(b) would not have been satisfied."

For these reasons the Union must be a party to this action if it is remanded for trial. In addition, the fact that the Union is in a superior position to defend against a claim that it breached its duty of fair representation cannot be denied. Further, its interest in protecting the position of other Union members in the face of the possible reinstatement of an employee who has been removed from the workforce for more than five years, is well recognized. *See, e.g., Neal v. System of Board of Adjustment (Missouri Pacific R.)*, 348 F.2d 722, 727-728 (8th Cir. 1965); and *Townsend v. Exxon Co., U.S.A.*, 420 F.Supp. 189, 190, n. 1. (D. Mass. 1976). A decision ordering the reinstatement of Clayton could well result in a detrimental effect upon other employees in the bargaining unit. At the least, the seniority of a number of employees would be affected and Clayton's reinstatement may result in a present employee being laid off. The Union must be a party to any proceeding which could have such profound effects upon the bargaining unit which it is statutorily obligated to represent. LMRA Section 9(a), 29 U.S.C. § 159(a).

III.

AS A MATTER OF NATIONAL LABOR LAW POLICY, THE EXHAUSTION OF INTERNAL UNION PROCEDURES COULD RESULT IN THE REACTIVATION OF THE GRIEVANCE AND ARBITRATION PROCESS.

There is another rationale which can be used to grant the Company protection from the employee's failure to exhaust internal union procedures. This Court can conclude that in light of national labor relations policy, the use of internal union procedures may result, as a matter of law, in the reinstatement of the underlying grievance and its arbitration.

The duty of fair representation is a judicially created obligation of the union. It is not specifically established in either the National Labor Relations Act or the Railway Labor Act. It arises out of a series of decisions commencing with *Steele v. Louisville N. R. Co.*, 323 U.S. 192 (1944), and culminating with the decision in *Vaca v. Sipes*, 386 U.S. 171 (1967). In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 at 564 (1976), the Court stated:

> "Since Steele v. Louisville N. R. Co., 323 U.S. 192 (1944), with respect to the railroad industry, and Ford Motor Co. v. Huffman, supra, and Syres v. Oil Workers Local 23, 350 U.S. 892 (1955), with respect to those industries reached by the National Labor Relations Act, the duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' Vaca v. Sipes, 386 U.S. at 182."

It is fundamental that collective bargaining agreements are assumed to have been negotiated on a foundation of national labor relations policy. The use of internal union procedures by employees to review alleged breaches of the duty of fair representation and the acceptance of that pro-

cedure by courts[19] is a foundational fact upon which all collective bargaining agreements are negotiated. Unless those agreements specifically state to the contrary, it must be conclusively presumed that they incorporate this national policy.

This Court's decision in *Nolde Bros. Inc. v. Bakery Workers*, 430 U.S. 243 (1977), recognized that national labor policy is deemed incorporated in collective bargaining agreements unless it is clearly and unequivocally negated in the agreement.

In *Nolde Bros.* the Court stated:

> "It is also noteworthy that the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements." *Id.* at 254.

The Court cited one of the Steelworkers Trilogy cases as establishing the national labor policy that there is a "strong presumption favoring arbitrability", *Id.*, and stated that:

> "The parties must be deemed to have been conscious of this policy when they agree to resolve their contractual differences through arbitration." *Id.* at 255.

Based on this national policy favoring arbitration, this Court found that unless the collective bargaining agreement "expressly or by clear implication" negates the presumption favoring arbitration, the obligation to arbitrate continues for an indefinite period after the collective bargaining agreement expires. The Court concluded that unless such an express provision is contained in the contract, it must be concluded that the parties to the collective bargaining agreement "*intended to arbitrate all grievances arising out of the contractual relationship*". *Id.* (Emphasis added.)

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[19]See footnote 14.

This analysis applies equally to the factual situation presented in the case presently before the Court. In fact this is a stronger case because it presents a grievance which occurred during the normal term of the collective bargaining agreement. In *Nolde Bros.* the Court dealt with a grievance which occurred after the expiration of the collective bargaining agreement.

The Union and the Company are presumed to have known of the strong federal labor policy in favor of arbitration. They are also presumed to have known of the policy with respect to the Union's duty of fair representation and the obligation of employees to exhaust internal union remedies. In light of this policy, the parties negotiated a broad obligation to arbitrate grievances arising under the Agreement. Article VIII of Agreement (J.A. 31) provides as follows:

> "The Company and the Union recognize the necessity for speedy and equitable adjustment of all grievances or disputes. Both parties pledge their best efforts and cooperation in a joint effort to make the grievance procedure function satisfactory for all concerned."

Article IX of the collective bargaining agreement (J.A. 35), states in Section 1:

> ". . . grievances or disputes as to (1) interpretation or application of an express provision of this Agreement, or (2) any violation of an express provision of this Agreement . . . may be arbitrated. . . ."

It is the Company's position that Clayton was discharged for "just cause." (See: UAW letter to NLRB, J.A. 78-79). Article II of the Agreement, Management Rights, provides that the Company has the right to "discipline, suspend or discharge for just cause." (J.A. 31). Section 10 of Article X, Seniority, (J.A. 40), provides that an employee's seniority "shall be broken and terminated" in the event of "[d]ischarge for cause." As a result of these express pro-

visions of the collective bargaining agreement, the discharge of Clayton was subject to the grievance and arbitration provisions.

Because of the national labor policy favoring arbitration and the broad grievance and arbitration procedure negotiated in the contract, the parties should have, if that was their intent, "expressly or by clear implication" provided that grievances could not be reinstated in the grievance procedure if it was determined that a breach of the duty of fair representation occurred. It must be presumed, in light of national labor policy, that since the parties did not "negate" such reinstatement, they intended that such grievances could be reinstated.

This national labor policy could have been negated by express language in the collective bargaining agreement or by a union review procedure which was limited in scope.[20] As noted above, it was not negated by the collective bargaining agreement. In addition, the PRB of the UAW has broad powers. (*See*, Int'l. Const. J.A. 62-77). In fact in *Pfeiffer*, PRB Decision No. 192 (J.A. 100-109), the International Executive Board, whose decision was affirmed by the PRB, directed the Local to "process a new grievance" on behalf of the employee. (J.A. 102-103). This is similar to the broad power of the internal remedy in *Varra v. Dillon Companies, Inc.*, 615 F.2d 1315, which the court found could result in the reinstatement of the grievance. As a consequence of national labor policy, that court held that the employee's failure to exhaust the internal union remedy was a defense for the employer as well as the union. *Id.* at

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[20]See *Orphan v. Furnco Constr. Corp.*, 466 F.2d at 801, where the court found that the pursuit of the intraunion remedy could not reinstate the grievance, since the Teamsters appeal board had only the power to impose "criminal-type" penalties for breach of the duty of fair representation.

1318. *Accord, Neipert v. Arthur G. McKee & Co.*, 448 F.Supp. 206; *Pawlak v. International Broth. of Teamsters, Etc.*, 444 F.Supp. 807.

Based on the foregoing analysis, it can be concluded that the Union's internal procedure does in fact provide an adequate remedy to Clayton. If he had exhausted the internal union remedy, and it had been concluded that in fact the Union breached its duty of fair representation, the grievance could have been reinstated in the grievance procedure and processed to arbitration. As a result, Clayton's failure to exhaust the available internal union remedies is a defense for the Company as well as the Union.

IV.

THE FAILURE TO EXHAUST INTERNAL UNION REMEDIES SHOULD NOT BE A DEFENSE FOR ONLY THE UNION.

In the event the Court does not find any of the foregoing arguments persuasive, it should be concluded that a plaintiff's failure to exhaust internal union remedies is not a defense for either the employer or the union for a number of reasons.

It is fundamental that internal union procedures cannot result in reinstatement of the employee's grievance unless the union and the employer explicitly agree, or this Court adopts the policy reviewed in Argument III. Absent one of those reasons, or the adoption of the policy set forth in part I of the Argument, it may be the conclusion of the Court that the union remedy cannot result in adequate relief to the employee. Even if the union finds a breach of the duty of fair representation, the employee would still be required to proceed to federal court in order to prove to the court's satisfaction that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement. Requiring the employee to exhaust in-

ternal union procedures in such circumstances is to require a futile act which can consume a substantial period of time and money. The employee is still ultimately required to resort to federal court in order to pursue his claim to reinstatement.

In addition, relieving an employee of any responsibility to exhaust internal union procedures before he may sue his employer, but allowing the union to rely on the failure to exhaust, allows the employee to circumvent a union's good faith determination that the matter should not be arbitrated. Without the union as a party, the employee may prevail on a prima facie showing. Since the union has no potential liability, it may have little incentive to support its decision. In addition, there is the possibility of collusive action between the employee and the union. The union of course is the traditional adversary of the employer and the protaganist of employee claims. If an employee fails to exhaust the available union procedure and instead chooses to sue only his employer, the union, assuming the failure to exhaust internal union procedures is a defense for the union, no longer has any liability for a breach of the duty of fair representation. At this stage of the proceeding, it may be in the best interests of the union to assist the employee in his proof of the breach of the duty of fair representation. At the very least the union may find it politically expedient not to cooperate with the employer in presenting a defense to the alleged breach of the duty. A union may conveniently find that documents it once possessed concerning its conduct and its reasons for dismissing the grievance have disappeared and that the union witnesses cannot fully recall the reasons for their decision.

Further, the decision of the Ninth Circuit provides the union a method to avoid the requirement to arbitrate a grievance. It allows the union the ability to control the grievance

procedure and to require the judicial determination of issues that should be decided in the arbitration process. Such a result is obviously in direct conflict with the national labor policy and should be avoided. Because of these possibilities, it would be more beneficial to completely eliminate the rule requiring the exhaustion of internal union remedies. If the exhaustion of internal union procedures is not a defense for the Union, it would be required to defend its actions, and be liable for damages caused by its breach of the duty. There would be a strong incentive on the part of the union to properly perform its duty of fair representation.

In addition to these practical reasons, the Court's decision in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), raises a question as to whether the exhaustion of internal union remedies may ever be a prerequisite to the institution of a breach of the duty of fair representation lawsuit. Although that case arose out of a NLRB proceeding in which a union member filed an unfair labor practice charge against his union, without exhausting internal union remedies, the opinion speaks in broad terms. Justice Douglas found that Section 101(a)(4) of the LMRDA did not require the exhaustion of internal union remedies prior to filing a charge. He concluded that federal courts "may in their discretion" stay their review for four months where the complaint concerns a strictly "internal union matter." However, the opinion also states that:

> "Where the complaint, as in the instant case, raises a matter that is in the public domain and beyond the internal affairs of the union, the union's internal procedures are, as previously explained, plainly inadequate." *Id.* at 427, n.8.

This reasoning, although in the context of a NLRB proceeding, may be equally applicable to a case involving the breach of the duty of fair representation. As in the *Marine*

Workers case, a breach of the duty of fair representation may be found to be "in the public domain and beyond the internal affairs of the union." *Id.* at 427, n. 8.[21] Based on this analysis it can be argued that an employee, in a case involving the duty of fair representation, never has a duty to exhaust internal union remedies.[22]

Conclusion.

For the reasons discussed above, the Company respectfully requests the Court to reverse the Ninth Circuit judgment with respect to the Company and affirm the judgment of the district court dismissing Clayton's claims against both the Company and the Union.

Respectfully submitted,

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January 16, 1981.

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[21]*See, Chambers v. Local U. No. 639*, 578 F.2d 375 at 386 (D.C. Cir. 1978), wherein the court found a breach of the duty of fair representation case to raise "a matter that is in the public domain. . . ."

[22]If the court adopts either of the positions suggested in the prior arguments in this brief (see Summary, *supra*, pp. 10 and 11) the statements in the *Marine Workers* case can be distinguished on several grounds. The statements arose in the context of the National Labor Relations Act; they extend to matters not directly involved in the appeal; and in that case public policy justified the result. In the case at bench, the requirement to exhaust internal union remedies would not inhibit access to any governmental agency and public policy would be promoted by encouraging the use of private dispute resolution procedures.

APPENDIX.

Federal Rules of Civil Procedure.

Rule 19: Joinder of Persons Needed for Just Adjudication

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment ren-

dered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder*. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions*. This rule is subject to the provisions of Rule 23.

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